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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NO.

JESSE BENJAMIN STONER,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS AND TO THE SUPREME COURT OF THE STATE OF ALABAMA

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QUESTIONS PRESENTED

I.

Whether the due process rights of petitioner under the Fourteenth Amendment to the United States Constitution were violated by the State of Alabama's highly prejudicial delay of over nineteen years before indicting him for his alleged crime - a delay for which the State can give no reason - substantially prejudicing petitioner by delaying his indictment until after the death of four of his witnesses and the loss of documents which would have proven his innocence.

II

Whether petitioner's rights to equal protection were violated when the Alabama Court of Criminal Appeals ruled that the three year statute of limitations did not bar his prosecution when he was indicted in 1977 for a crime he allegedly committed in 1958, but impliedly held that the prosecution of a person who committed the same crime since this Court outlawed the Alabama death penalty in 1972 would be barred by that statute of limitations.

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Petitioner Jesse Benjamin Stoner respectfully prays that a writ of certiorari issue to the Alabama Court of Criminal Appeals in order that this honorable Court might review the decision in this case rendered in the court below.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal

Appeals (Appendix, infra) is reported at **STONER v. STATE**, 418 So.2d 171 (Ala.Crim.App . 1982).

When the Supreme Court of Alabama denied certiorari on August 13, 1982, there was no majority opinion rendered and only one dissenting opinion by Justice Faulkner of that court. Said dissent (Appendix, infra) is reported at **EX PARTE STONER**, 418 So.2d 184 (Ala. 1982.)

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3) and Rule 17 (b) and (c) of the Rules of this Court. On October 1, 1982 the Honorable Justice Lewis F. Powell, Associate Justice of the United States Supreme Court, signed an order extending time to file petition for writ of certiorari up to and including November 11, 1982 (Appendix, infra).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1, the Fourteenth Amendment to the United States Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

Proceedings Below

The indictment against petitioner charged that he "set off or exploded dynamite or other explosives in, under or dangerously near to" an inhabited dwelling. No one was killed or injured on account of this explosion. Your petitioner is the only person to have ever been prosecuted in connection with this incident. After a jury trial in the Circuit Court of Jefferson County, Alabama, he was convicted and sentenced to ten years in prison.

The indictment against petitioner was returned on the 26th day of September, 1977, over nineteen years after the date of the offense which occurred on the 29th day of June, 1958. (Tr. 93) The investigation of petitioner's possible involvement terminated in July of 1958. (Tr. 274) During that period of 19¼ years, no new evidence pertaining to petitioner or this case was ever brought forward.

Prior to trial the trial court overruled petitioner's plea in bar based on the prejudicial pre-indictment delay of 19¼ years that violated the due process rights of petitioner.

The trial court also erred in overruling petitioner's plea to the statute of limitations.

After conviction the trial court released petitioner on a $20,000.00 bail bond and suspended his sentence pending appeal. (Tr. 455) Petitioner then filed a motion for new trial or judgment of acquittal (Tr. 514) and later supplemented that motion. (Tr. 519) The motion for a new trial as supplemented was overruled by the trial court. (Tr. 521 & 522)

On July 7, 1981 petitioner filed his brief and argument in the Alabama Court of Criminal Appeals and on

April 20, 1982 that appellate court affirmed petitioner's judgment of conviction. Said Court rejected all of petitioner's grounds for reversal based on grounds of the Fourteenth Amendment. Since that court is Alabama's highest court of appeals by right of law in criminal cases, petitioner timely filed his application for rehearing which was denied on May 18, 1982.

On May 28, 1982 petitioner filed a petition for writ of certiorari with the Supreme Court of Alabama which was denied on August 13, 1982. There was no majority opinion, but Justice Faulkner wrote a dissenting opinion in favor of petitioner (Appendix, infra).

On August 20, 1982 the Alabama Court of Criminal Appeals granted a stay of sixty (60) days from August 13, 1982 to allow petitioner to file a petition for writ of certiorari in the United Stated Supreme Court (Appendix, infra). On October 1, 1982 Honorable Lewis F. Powell, Jr., Associate Justice of this honorable Court issued an order extending time to file petition for writ of certiorari up to and including November 11, 1982 (Appendix, infra).

Statement of Facts

The State's main witness, Lt. Tom Cook, retired, testified that he met with petitioner on June 21, 1958 in Birmingham, Alabama along with another police detective, Captain Pattie of the Birmingham Police Department, now deceased, and an informer, Hugh Morris, in a Studebaker owned by Mr. Morris. (Tr. 249-258) Sgt. Cook testified that unidentified people left it up to him and Captain Pattie to select a responsible person to arrange for the bombing of Rev. Shuttlesworth's church, but they did not have the money to pay for a bombing. Lt.

Cook said that he hoped for a total destruction of the church which would persuade Rev. Shuttlesworth to leave Birmingham and go up "north where he belonged." (Tr. 257)

Cook and Pattie talked about paying petitioner $2,000.^00, but there was no meeting of the minds and no money was ever paid to petitioner, according to the testimony of Lt. Cook. (Tr. 227) An attempt to bomb the church was made a week later on June 29, 1958. On July 12 the same four individuals met again at the same place in the previously mentioned car. This second meeting on July 12, 1958 was observed by other Birmingham police officers, F.B.I. agents and by the late Judge E.C. Watson of the Circuit Court of Jefferson County, who was an Assistant Solicitor in 1958. No arrest was made.

Lt. (then Sgt.) Cook testified that the last fruitful investigation that had been conducted in the case was that second meeting with petitioner on July 12, 1958. (Tr. 228-277) Sgt. Cook testified that no arrest was made until September of 1977, despite the general arrest powers of all officers involved. (Tr. 275) All of the conversations Lt. Cook had with petitioner were in regard to bombing Rev. Shuttlesworth's church. Yet, petitioner was not indicted for bombing that church, but for setting off explosives near an inhabited dwelling in the proximity of the church.

Rev. Fred Shuttlesworth, who was pastor of the church at the time, testified that during 1958 Birmingham police officers frequently attended meetings in his church and that he protested to no avail and eventually had a lawsuit about it. (Tr. 286) He said the lawsuit did not end such harassment by the police and the police would record the meetings of his movement electronically and by sitting in the meetings taking notes. (Tr. 286 & 287)

Rev. Shuttlesworth testified that the Birmingham Police persecuted his civil rights movement when it was meeting at his church and at other places. (Tr. 286 & 287) He left Birmingham in August of 1961 and moved back to Cincinnati where he lived at the time of the trial. (Tr. 90 & 91) That was Lt. Cook's objective as mentioned above. (Tr. 257).

Petitioner testified that he met with Lt. Cook, Captain Pattie and Mr. Hugh Morris because he was going to expose them for attempting to entrap people and that he made public speeches exposing them for attempting to entrap him. (Tr. 340, et seq) He nevertheless emphatically denied any involvement whatsoever in said crime.

No one identified petitioner at the scene of the explosion on the day that it happened. Petitioner was not seen at the scene of the explosion and the State conceded that he did not personally place an explosive there. Witnesses did not claim to see anybody place the explosive and this case rests upon circumstantial evidence.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Alabama Court of Criminal Appeals in affirming the trial court's overruling petitioner's plea in bar and motion for new trial based on the highly prejudicial pre-indictment delay of over nineteen years after the alleged criminal act is in violation of the due process rights of petitioner under the Fourteenth Amendment and conflicts with this Court's ruling in **UNITED STATES v. MARION**, 404 U.S. 307 (1971); **UNITED STATES v. LOVASCO**, 431 U.S. 783 (1977) and **UNITED STATES v. VALENZUELA-BERNAL**, 102 S. Ct. 3440 (1982). The decision is also in conflict with United

States Courts of Appeal in **UNITED STATES v. CORDOVA**, 537 F.2d 1073 (1976); **UNITED STATES v. RICE**, 550 F.2d 1364 (1977); **UNITED STATES v. BRAND**, 556 F.2d 1312 (1977); and especially in conflict with the decision in the United States Court of Appeals for the Fifth Circuit in **UNITED STATES v. TOWNLEY**, 665 F.2d 579 (1982). It is in further conflict with the Supreme Court of West Virginia in **STATE v. HEY**, 269 S.E. 2nd 394 (1980); and the Supreme Court of Illinois in **PEOPLE v. LAWSON**, 367 N.E. 2nd 1244, 1248 (1977). The opinion of the Alabama Court of Criminal Appeals follows a rule that is in opposition to the many courts which have ruled that a long, unexplained pre-indictment delay shifts the burden once petitioner shows that he has been prejudiced by the delay. **UNITED STATES v. TOWNLEY**, supra, **STATE v. HEY**, supra and other jurisdictions disagree with the Alabama courts and have ruled that where there is a long unexplained pre-indictment delay, prejudice is presumed and the burden then rests on the prosecution to show that the delay was justified, which the State failed to do in your petitioner's case. Rule 17 (b) of the Rules of this Court.

Many of the facets and aspects of prejudicial pre-indictment delay in violation of due process have been ruled on by various courts in ways which favor petitioner's position. The conflict now needs to be settled by this Court in accordance with Rule 17 (c) of the Rules of this Court.

Should the unexplained 19¼ year delay in instituting prosecution in this case be considered substantially equivalent in legal import to a delay occasioned by the prosecution's desire to obtain a tactical advantage over the accused? This instant case at bar breaks all records

in terms of time as shown by all of the other cases which have dealt with pre-indictment delay.

The record demonstrates that the offense charged in the indictment occurred in the early morning hours of June 29, 1958 in Birmingham. (Tr. 93) It is undisputed that the indictment on which the conviction is based was returned by the Jefferson County grand jury on September 26, 1977. (Tr. 464) The State's two prosecuting attorneys conceded at trial that there was no reason they knew of why the case was not earlier brought to the attention of the grand jury, nor why Alabama and Jefferson County prosecutors and law enforcement officers did not earlier endeavor to resolve the matter of prosecuting petitioner. [Testimony of Honorable Burton Dunn, Assistant District Attorney, Jefferson County, Alabama (Tr. 418-420) and testimony of John A. Yung, IV, Assistant Attorney General. (Tr. 421-426)]

Likewise, it was conceded that petitioner had done nothing to impede or hinder the procurement of the indictment. It is likewise conceded by the State that there was no new evidence developed and that there were no new leads pursued in the ensuing 19¼ years up to and including the day of indictment. (Tr. 419, 420, 423) The State virtually admitted and the Trial Court apparently found as a matter of fact that the reason for the delay was that the State did not believe that it could secure a conviction at an earlier date, but did believe that they would have a better chance to do so almost twenty years after the alleged crime. (Tr. 459)

In considering contentions of prejudicial delay in violation of due process, this Court has implicitly held that the reasons which the prosecution assigns for such a delay must be weighed against any harm that inures to

the accused in presenting his defense. **United States v. Lovacso**, Supra; **United States v. Marion**, supra. This Court has never before had an opportunity to review a case where absolutely no reason was advanced to explain a pre-indictment delay as long as in the present case. Even the decision of the Alabama Court of Criminal Appeals acknowledges that the delay herein is unexplained.

Lower federal and state appellate courts faced with the same issue presented in this case have held that an unexplained, extensive delay in instituting prosecution can be deemed to be the legal equivalent of a delay occasioned by a design to obtain a tactical advantage over an accused. **UNITED STATES v. BARKET**, 532 F. 2nd 189 (8th Cir., 1975); **United States v. Townley**, supra, **United States v. Richburg**, 478 F. Supp. 535 (M.D. Tenn. 1979); **State v. Hey**, supra. In the case of **State v. Hey**, the Supreme Court of Appeals of the State of West Virginia said that an unexplained delay of eleven years in beginning a criminal prosecution by seeking an indictment gave rise to a presumption of prejudice to the accused and obliged the State to justify the delay. The decision of that court of last resort is in obvious conflict with the Alabama appellate courts..

Contrary to the decisions of the Alabama Court of Criminal Appeals, the courts of many jurisdictions have ruled that where there is a long unexplained delay, prejudice is presumed and the burden then rests on the prosecution to show that the delay was justified. The State of Alabama offered no excuse for its 19¼ year delay and it failed in its obligation to show a logical and legitimate reason consistent with due process requirements of the United States Constitution.

In **People v. Gulley**, (1980) 404 N.E. 2nd 1077, 83 Ill.

App. 3rd 1066, the Illinois Court of Appeals thought that a 51 month indictment delay was too long and adopted the language of People v. Lawson, supra, which said, "If the accused satisfies the trial court that he or she has been substantially prejudiced by the delay, then the burden shifts to the State to show the reasonableness, if not the necessity for the delay." That court went on to say, "The length of the delay here, 51 months, causes great suspicion and gives rise to a presumption that the delay was prejudicial." 404 N.E. 2nd 1077, 1080.

The long delay, over four times as long as in **Gulley**, gives rise to a presumption and should cause the burden to be on the prosecution to show the reasonableness of the delay, contrary to the holding of the Alabama Court of Criminal Appeals in the case at bar.

The Alabama Court of Criminal Appeals is in conflict with the decision of the United States Court of Appeals in **United States v. Townley**, supra, which approvingly quotes **United States v. Brand**, supra, in saying that a pre-indictment delay of 41 months was too long and would not automatically justify prejudice to an accused.

The reasoning of the foregoing cases is in accord with the obvious fact that the prosecution's intent in such circumstances can only be proven by the results it achieves since, few, if any, prosecuting attorneys would ever expressly admit to having a desire to prejudice an accused in the presentation of his defense by delaying prosecution for an inordinate period of time. In the absence of such inferences of intent, the task of a defendant such as the petitioner in proving a prosecutor's plan to gain a tactical advantage and to embarass a defendant in his defense will be almost insurmountable if not impossible. One cannot interrogate prosecuting

attorneys, law enforcement officers and other government officials involved in an accused's case as to their reason for not bringing charges over nineteen years earlier when such individuals may be dead or no longer able to remember the details of the case, or when their whereabouts may be unknown.

In this case the State gave no reason or excuse for its delay. When the Alabama Supreme Court denied certiorari, there was only one opinion, the dissenting opinion (Appendix, infra) by Justice Faulkner whose opinion stated,

> The Court of Criminal Appeals affirmed, and conceded that no explanation appears in the record justifying the 19 years' delay. It can be inferred that the 19 years' delay was for the State to gain a tactical gain over Stoner. In other words, wait long enough and a climate of conviction will emerge, whereas if Stoner had been tried within a reasonable time, chances were greatly in his favor that he would have been acquitted. The trial judge stated, "I would almost find that as a matter of fact for the reason of delay the State did not feel they could successfully prosecute in 1958."

It is clear that where the prosecution has delayed, as in the present case, so that the prosecution could gain some tactical advantage, the delay was prejudicial and the conviction should be reversed. **United States v. Marion**, supra; **United States v. Lovasco**, supra; and the way that those cases have been interpreted, **United States v. Cordova**, supra; **United States v. Rice**, supra; **United States v. Alderman**, 423 F. Supp. 847; **People v. Gulley**, supra; **State v. Hey**, supra, and others.

The unexplained pre-indictment delay of over nineteen years, longer than any other case on record, was palpably unjustified. That 19¼ year delay creates a presumption of prejudicial delay which violates petitioner's due process rights.

The ruling of the Alabama Court of Criminal Appeals additionally conflicts with **United States v. Mills**, 641 F. 2nd 785 (9th Circuit 1981) and with this Court's recent decision in **United States v. Valenzeula-Bernal**, supra. As specified by these two cases, petitioner made and submitted his own affidavits showing that four of his witnesses died before his indictment which in turn made a showing of what each would have testified to if still alive. In **United States v. Mills**, supra, the United States Court of Appeals for the Ninth Circuit said:

> Showing that witnesses have been lost or that evidence has become unavailable due to the delay suggests actual prejudice. But it is not enough to assert that potential witnesses have been lost. A defendent must identify the witnesses, relate the substance of their testimony, and efforts made to locate them.

The record shows that petitioner did all of the things required by the **Mills** case and also introduced properly authenticated death certificates that proved the death of his four deceased witnesses during the 19¼ year period of time between the day of the alleged crimes and the day of indictment.

This Court's decision in **Valenzuela-Bernal**, supra, said:

> In other cases the criminal defendant may advance additional facts, either consistent with facts already known to the court or accompan-

> ied by reasonable explanation for their inconsistency with such facts, with a view to persuading the court that the testimony of a deported witness would have been material and favorable to his defense. Because in the latter situation the explanation of the materiality is testimonial in nature, and constitutes evidence of the prejudice incurred as a result of the deportation, it should be verified by oath or affirmation of either the defendant or his attorney. 102 S.Ct. at page 3450.

Petitioner did verify with affidavits as to what the testimony of his deceased witnesses would have been and attested to the materiality of their testimony with the procedure and fashion required by **Valenzuela-Bernal**, supra. The decision of the Alabama Court of Criminal Appeals therefore conflicts with those two cases when it denounces petitioner's affidavits as "self-serving declarations" and as "rank hearsay" (Appendix, infra).

Even though the prosecutors stated in the trial that they did not claim that petitioner personally set off the explosion, they nevertheless claimed that he got "his boys" to do it. Yet, they introduced no evidence whatsoever to identify such "boys" and introduced no witnesses who claimed they ever saw any such boys. There were no eye witnesses to testify that they saw anybody set off the explosion in this case of circumstantial evidence. There was no evidence to support their conjecture of a conspiracy. The indictment did not allege a conspiracy and named petitioner as sole defendant. Two of petitioner's witnesses would have been alibi witnesses who would have testified that he was in Georgia and not in Alabama at the time of the offense on June 29, 1958.

Petitioner submitted an authenticated death certificate showing that his landlady, Mrs. Hortez Johnson, had died on September 2, 1961 and an affidavit showing that she would have testified to facts proving that petitioner could not have been in Birmingham, Alabama at the time of the alleged bombing because he was in Dublin, Georgia on that critical date. By the same means, petitioner showed by affidavit and death certificate that Beverly Bernard Tanner, Jr. of Dublin, Georgia was with petitioner in Georgia at the time of the alleged offense in issue and that petitioner was not in Birmingham, Alabama. The death certificate introduced into evidence showed that Mr. Tanner died on February 10, 1977 which, of course, was prior to the date of indictment. Petitioner's affidavit also reflects that Mr. Tanner could have corroborated petitioner's testimony in other material aspects.

Another affidavit submitted by petitioner sets forth the probable testimony of Ralph Barron, another associate of his during the period when this crime occured. His testimony, had it been available to the defendant, could have possibly persuaded the jury to acquit. However, a properly authenticated death certificate tendered with the affidavit shows that Mr. Barron died on August 10, 1976.

An affidavit of particular importance submitted by petitioner was the one embodying the putative testimony of Mark Richard Bowling, III. His death certificate in evidence showed that he died on September 23, 1973. Bowling's testimony would have shown that petitioner knew that he was dealing with police agents when they initially discussed the bombing. This testimony would have obviously rendered it highly unlikely that petitioner ever intended actually to participate in any such crime.

Bowling could have additionally testified that after the crime had taken place another person, Hugh Morris, admitted to Bowling that he was the person who ordered the church to be bombed by using a police informer. The exculpatory value of such testimony to the petitioner is self-evident.

If those four dead witnesses had been alive and testified for petitioner, their testimony could easily have presuaded the jury of petitioner's innocence or could have at least created a reasonable doubt as to his guilt. All of their testimony would have been admissible, material, relevant and probative as to the issues in the case. Contrary to the decision of the lower court, Mr. Stallworth's testimony would not have taken the place of the testimony of any of the four deceased witnesses. For instance, Mr. Bowling knew informer Hugh Morris, whereas Mr. Stallworth did not know him personally.

Concerning governmental action which leads to the unavailability or the destruction of evidence of possible exculpatory value to the accused, this Court in **United States v. Agurs**, 427 U.S. 97, 112-113 (1976) set forth the following standard for determining materiality:

> The proper standard of materiality must reflect our overriding concern with the justice of finding guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the addi-

> tional evidence is considered, there is no justification for a new trial. On the other hand if the verdict is of questionable validity, additional evidence of relatively minor importance might be sufficient to create reasonable doubt.

Petitioner introduced evidence to prove that he was working for State Farm Mutual Automobile Insurance Company in the City of Dublin in middle Georgia at the time of the offense. He proved that he was employed at that time in 1958 at State Farm's office in Dublin and adjusted accident claims for them in a seventeen county area. Testimony was introduced showing that his duties included taking statements from witnesses to accidents and settling accident claims. Petitioner negotiated settlements and wrote checks as he was authorized to do by the company. (Tr. 312) He kept a daily record of his expenses including motel bills, gasoline and oil and each week sent them to his regional office for reimbursement. All such daily records that were submitted weekly were dated and would have shown the whereabouts of petitioner during June of 1958.

An official of State Farm testified that his company had destroyed all such employee records as needed by petitioner in 1972. (Tr. 294-302) These records which would have helped prove the innocence of petitioner, as well as that the State's two main witnesses, Tom Cook and C.S. Johnson, were testifying falsely against petitioner were destroyed by the company and unavailable to petitioner because of the pre-indictment delay of almost twenty years. In conflict with the Court's decisions in **United States v. Marion**, supra, **United States v. Valenzuela-Bernal**, supra, and in conflict with various U.S. Courts of Appeal and state courts of last resort, the

Alabama Court of Criminal Appeals simply brushed aside the strong evidence of prejudice occasioned by the delay. That court completely disregarded the importance of the unavailable and destroyed documentary evidence, the loss of which seriously prejudiced the defense of petitioner. That unavailable documentary evidence would have been admissible.

Petitioner submits that in order for the Alabama Court of Criminal Appeals to have found that he was not prejudiced by the delay, it would have been incumbent upon that court to assess and examine every single item of absent or lost testimony and documentary evidence enumerated above in order to determine each item's admissibility in an Alabama trial court. A cursory reading of its opinion shows that it did not engage in any such evidentiary analysis.

Given the highly circumstantial nature of the State's case against petitioner, the proposition also necessarily follows that if that court were to find any single item of his proffered evidence to be admissible, petitioner would have to be deemed to have shown prejudice resulting to him from the delay as a matter of law and his conviction would have to be reversed. The principles enunciated above set forth by this Court in **United States v. Agurs**, supra, and **United States v. Valenzuela-Bernal**, supra, allow no other result.

Since this is the only conviction of petitioner in his life and he had never been convicted of any offense before this (Tr. 342) and has never been convicted of any offense since, there was no reason for him to anticpate and prepare for an indictment returned in September, 1977 for an alleged offense committed in June of 1958, the decision of the lower court notwithstanding.

For all of the reasons set forth above, the decision of the Alabama Court of Criminal Appeals violates petitioner's due process rights as guaranteed by the Fourteenth Amendment and that decision conflicts with the decisions of this Court cited above and conflicts with decisions of various United States courts of appeal and state courts of last resort.

Accordingly, certiorari should be granted to review this substantial conflict between the Alabama Court of Criminal Appeals on the one hand and the several United States courts of appeal and various State courts on the other hand, so as to resolve all of these conflicts and so that this Court may examine all of the facets and aspects of pre-indictment delay that have been resolved by other courts but not by this Court. The petition for a writ of certiorari should be granted.

REASONS FOR GRANTING THE WRIT

II

Petitioner was indicted on September 26, 1977 for a crime that allegedly occurred on June 29, 1958 and the Alabama Court of Criminal Appeals ruled that his prosecution was not barred by Alabama's three year statute of limitations, but impliedly held that a person who committed the same crime since this Court outlawed the Alabama death penalty in the case of **FURMAN v. GEORGIA**, 408 U.S. 238 in 1972 could benefit from the statute of limitations. That decision by the Alabama Court of Criminal Appeals violated petitioner's right to equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

Petitioner was charged with violating the provisions of Title 14, Section 123 of the Alabama Code of 1955 which has been carried forward into the Alabama Code of 1975 as Section 13-2-60 and is unchanged except that the death penalty provisions are deleted.

At the time of the alleged crime on June 29, 1958, the State of Alabama could have inflicted the death penalty upon petitioner for allegedly setting off explosives dangerously near an inhabited dwelling even though no one was killed. In this case, no one was killed. The State has not been able to impose the death penalty upon petitioner since this Court's decision in **FURMAN v. GEORGIA**, supra. Since 1972 there has been no death penalty for violating either the old or the new code section unless someone is killed. Since petitioner was not indicted for the 1958 bombing until September 26, 1977, he is entitled to the benefit of Alabama's three year statute of limitations as provided by Title 15, Section 221 of the Alabama Code of 1940 and Section 15-3-1 of the Alabama Code of 1975.

That the term "capital offense" is and has been a rather amorphous and changing category of crimes in Alabama, other than those specifically enumerated in the limitations statute such as murder, is evident from a cursory reading of the Alabama Supreme Court's decision in **BECK v. STATE**, 396 So. 2nd 645 (1980). Also obvious is the proposition that after this Court's ruling in **FURMAN v. GEORGIA**, 408 U.S. 238 (1972), capital felonies as such ceased to exist in Alabama. Such a result necessarily obtains because the Alabama appellate courts had heretofore ruled that no offense can be truly capital unless the death penalty can be imposed. **EX PARTE, McCRARY**, 22 Ala. 65, 72; **LEE v. STATE**, 13 So. 2nd 583

(Ala. App. 1943).

The Alabama Court of Criminal Appeals based its decision on a misunderstanding of **MANUCY v. WADSWORTH**, 293 So. 2nd 345 (Fla. 1974). The Supreme Court of Florida clarified its **MANUCY** opinion when it ruled in **REINO v. STATE**, Fla. 352 So. 2nd 853 (1977) and **REINO** fully supports petitioner's right to Alabama's three year statute of limitations. Since the Alabama Court of Criminal Appeals is relying on the Florida Supreme Court, it should not be in conflict with that court's ruling in **REINO v. STATE**, supra, which was presented in petitioner's brief to the Alabama courts. Rule 17 (b) of the Rules of this Court.

The Alabama Court of Criminal Appeals (Appendix, infra) says that the statue of limitations is a substantive right and remains the same, regardless of **FURMAN v. GEORGIA**, supra, and that petitioner cannot have the benefit of the three year statue of limitations, in conflict with the Reino case by the Florida Supreme Court. **REINO v. STATE**, supra, refers to **MANUCY v. WADSWORTH**, supra, at page 856 in light of **DONALDSON v. SACK**, 265 So. 2nd 499 (Fla. 1972) and beginning at page 857, **REINO v. STATE** says:

> [2] The compelling tenor of Donaldson is to the effect that all attributes of capital crimes, procedural or substantive, fall when and so long as the death penalty is abolished. The State maintains that although procedural changes such as those discussed in Donaldson follow from abolition of the death penalty, substantive matters such as the statue of limitations were not so affected. This assertion, however, is refuted by cases from jurisdictions which have considered

> the effect of abolition of the death penalty on the substantive question of entitlement to bail. This court was not presented with that issue in Donaldson because, as noted, the applicable constitutional and statutory provisions limited the right to bail for offenses punishable by life imprisonment as well as those punishable by death.

At page 858, **REINO** goes on to say:

> Hence, it is apparent that all incidents of capital crimes, substantive as well as procedural, become inapplicable upon abolition of the death penalty. It would be conceptually inconsistent to conclude that the procedural advantages inuring to a defendant in a capital case fall with abolition of the death penalty and then conclude that the substantive disadvantages (limitations or entitlement to bail and unlimited statue of limitations) remain viable.

The Alabama Court of Criminal Appeals (Appendix, infra) said

> At the time appellant was indicted, Alabama's new dealth penalty provision was in effect and did not include appellant's alleged felony. Section 13-11-1 through 9, Code of Alabama 1975.

The Alabama Court of Criminal Appeals goes on to say that it agrees with the Florida Supreme Court and believes that the Florida Supreme Court in **MANUCY v. WADSWORTH**, supra, (1974) clearly and concisely addressed the issue. The Alabama court is in conflict with **MANUCY** and with **REINO v. STATE**, supra, a case that pointedly and clearly explains **MANUCY** to the effect that

petitioner is entitled to the benefit of the statute of limitations.

In addition to **REINO**, the better reasoned decisions which have dealt with this precise issue have held that a defendant who was being prosecuted under such circumstances as the petitioner should have the benefit of the statute that bars prosecution. **UNITED STATES v. PROVENZANO**, 423 F. Supp. 62 (S.D. of N.Y., 1976 **affirmed**, 556 F. 2nd 562 (2nd Circuit 1977); **UNITED STATES v. BROWN**, 422 A. 2nd 1281 (D.C. App. 1980). **PROVENZANO** especially fits petitioner's case.

Nevertheless, in deciding petitioner's case, the Alabama Court of Criminal Appeals is in conflict with the above cited cases by holding that the state has a perpetual right to prosecute petitioner for the criminal offense at issue since it was deemed to be a "capital offense" at the time that it was committed in 1958. Thus, petitioner is placed in the anomalous poistion of being subjected to everlasting criminal liability on account of this crime, whereas a similarly situated defendant who might be accused of having committed the same offense after the **FURMAN** decision would have the benefit of the three year statute of limitations against a tardy and stale prosecution of the matter. It is submitted that such an irrational and inexplicable distinction between petitioner and those people accused of having committed the same crime after the **FURMAN** decision in 1972 constitutes a denial to petitioner of due process and equal protection of the Alabama statue of limitations in criminal cases in contravention of the Fourteenth Amendment to the United States Constitution.

That statutes of limitation and their construction are subject to equal protection analysis is shown by two very

recent decisions of this Court, **MILLS v. HABLUETZEL**, 102 S. Ct. 1549 (1982); **G.D. SEARLE & CO. v. COHN**, 102 S. Ct. 1137 (1982). In **G.D. SEARLE & CO. v. COHN** at 1141-1142, this Court held that, at the very least, there must be a rational basis for a statute of limitations to delineate between cases of potential litigants. On the other hand, where more substantial personal interests are involved, such as the right to family identity and parental support, this Court has held that there must be a substantial relationship between the socially desirable ends sought to be acheived by a statute of limitations and the means, through the use of the statute, by which these goals are sought to be achieved. **MILLS v. HABLUETZEL** at 1555.

Given petitioner's fundamental, basic constitutional right to life and liberty, he argues that the state should be required to show a compelling interest in exempting his case from the statute of limitations provision before he can be deprived of its protection. No such interest or concern is enuciated in the decision of the Alabama Court of Criminal Appeals in which they have not only disregarded **PROVENZANO**, supra, but also a decision of the Florida Supreme Court in **MITCHELL v. STATE**, 25 So. 2nd 73 (1946) which illustrates that limitation of prosecution statutes are subject to equal protection analysis.

It is extremely doubtful that any reason can be cogenlty advanced for such disparate treatment of petitioner. Since anybody else charged with violating the same code section would be protected against prosecution by the statue of limitations, it would definitely deprive petitioner of equal protection of the law guaranteed by the Fourteenth Amendment to deny him the

benefit of the same statute.

Since the case of **FURMAN v. GEORGIA**, supra, (1972) declared the death penalty unconstitutional, petitioner should have the benefit of the three year statute beginning in 1958, or at the least, beginning in 1972 at the time of the **FURMAN** decision by this Court.

Accordingly, certiorari should be granted to review this substantial conflict wherein the Alabama decision conflicts with decisions of the Supreme Court of Florida, the United States Court of Appeals for the 2nd Circuit, and others.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Fleming Lee
300 Independence Avenue, S.E.
Washington, D.C. 20003

Attorney for Petitioner

November 10, 1982

CERTIFICATE OF SERVICE

This is to certify that upon the date stated above, I have served a true copy of the within and foregoing Petition for a Writ of Certiorari To The Alabama Court of Criminal Appeals and the Supreme Court of Alabama postage prepaid to opposing counsel by sending three copies to:

Honorable Charles E. Graddick
Attorney General of Alabama
250 Administrative Building
64 N. Union Street
Montgomery, Alabama 63130

and the required number of copies to:

Mrs. Mollie Jordan
Clerk
Alabama Court of Criminal Appeals
445 Dexter Avenue
Montgomery, Alabama 36104

Fleming Lee
Attorney for Petitioner

APPENDIX A

THE STATE OF ALABAMA - - JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
SPECIAL TERM, 1982

Ex Parte: Jesse Benjamin Stoner

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(Re: Jesse Benjamin Stoner

81-709 v.

State of Alabama)

PER CURIAM.

WRIT DENIED.

Torbert, C.J., Jones, Almon, Shores, Embry, Beatty and Adams, JJ., concur.

Faulkner, J., dissents.

81-709 -- Ex parte Jesse Benjamin Stoner

FAULKNER, JUSTICE (Dissenting).

I would grant the petition for writ of certiorari.

A bombing of a black church occurred in Jefferson County on June 29, 1958. Over 19 years later, September 26, 1977, Stoner, a white man, was indicted for the bombing and was convicted in the circuit court.

The Court of Criminal Appeals affirmed, and conceded that no explanation appears in the record justifying the 19 years' delay. It can be inferred that the 19 years'

delay was for the State to gain a tactical advantage over Stoner. In other words, wait long enough and a climate for conviction will emerge, whereas, if Stoner had been tried within a reasonable time after the bombing, chances were greatly in his favor that he would have been acquitted. The trial judge stated, "I would almost find that as a fact for the reason of delay the State did not feel they could successfully prosecute in 1958."

The Court of Criminal Appeals upholds the delay by implying there was a continuing investigation. **See United States v. Marion**, 404 U.S. 307 (1971), and **United States v. Lovasco,** 431 U.S. 783 (1977). But, the court states in its opinion, **"In essence, no real reason for the delay can be found in the record."** Both **Marion** and **Lovasco** mandate that the court consider the reason for the delay, and the prejudice to the accused. CF. **United States v. West**, 568 F.2d 365 (5th Cir. 1978). By denying the petition for a writ of certiorari to the Court of Criminal Appeals, the majority of this court have also failed to consider the reasons for the delay and the prejudice to the accused.

In my opinion Stoner has been deprived of his due process rights to a fair trial. The fundamental conceptions of justice have been discreetly "swept under the rug."

I would grant the petition to consider whether fundamental due process of a fair trial has been denied Stoner.

I, Dorothy F. Norwood, as Acting Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and cor-

rect copy of the instrument(s) herewith set out as same appears of record in said Court. Witness my hand this 13 day of Aug, 1982

Acting Clerk, Supreme Court of Alabama

APPENDIX B

THE STATE OF ALABAMA - - JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1981-82

6 Div. 342

Jesse Benjamin Stoner
V.
State
Appeal from Jefferson Circuit Court

HARRIS, PRESIDING JUDGE

Appellant was indicted on the charge of unlawfully exploding dynamite dangerously near an inhabited dwelling. The indictment reads:

> "The grand jury of said county charge that, before the finding of this indictment, Jesse Benjamin Stoner, alias Jesse Benjamin Stoner, alias J.B. Stoner, whose name is to the Grand Jury otherwise unknown, willfully and unlawfully set off or exploded dynamite or other explosive in, under or dangerously near to the dwelling house of, to-wit: Mark E. Roberson, in which there was at the time a human being, to-wit: the said Mark E. Roberson."

The sufficiency of the evidence is raised by a motion to exclude the state's evidence and a motion for a new trial. The trial court denied both motions. We are put to a review of the evidence.

This case arose out of the attempted bombing of the predominately black Bethel Baptist Church during the

racial tensions that existed in Birmingham in the late fifties and early sixties. In the early morning hours of June 29, 1958, members of the Bethel Baptist Church noticed smoke rising from a paint can placed next to the church. After the men had moved the bomb away from the church, the bomb exploded, causing considerable structural damage to the church and the surrounding inhabited dwellings. After a long delay, appellant was indicted for the crime and tried by a Jefferson County Circuit Court jury. Appellant was found guilty and sentenced to ten years imprisonment.

Summary of the Evidence

The state's first witness was Reverend Fred L. Shuttlesworth, a prominent leader of the Birmingham civil rights movement. Reverend Shuttlesworth was pastor of the Bethel Church when the church was bombed. Around 1:30 a.m. on the day of the bombing, Reverend Shuttlesworth was awakened in the parsonage by a strong vibration which caused him to fall from his bed. Reverend Shuttlesworth immediately ran to his church and noted that the church had sustained a good deal of damage from some sort of explosion. He then called the local police and the F.B.I.

On cross-examination, Reverend Shuttlesworth testified that he never saw appellant in the vicinity of the church.

Luverne McWilliams lived with her parents across the street from the church and next to the parsonage. Around 1:30 a.m. on June 29, Ms. McWilliams was given a ride home from work. While standing on her porch she noticed near the church a five gallon paint can with smoke rising out of it. She called to the guards who

immediately ran to the can and moved it to the street. The can exploded, breaking out the windows of her house.

Ms. McWilliams' sister, Robbie Revis Smith, testified that, shortly after her sister had come home, she heard a loud explosion which broke out her windows, knocked the front door off its hinges and cracked the plaster. She too noted that the church had been considerably damaged.

Mark Roberson also lived across from the church. After the explosion awakened him, he noticed that the explosion had blown out his windows, causing sheetrock to fall, and had broken household objects. Debris from the explosion also dented the house's structure.

C.S. Johnson, a member of the Bethel Church, was on guard the morning of the explosion. He and the other guards were behind the parsonage when Ms. McWilliams called out that she saw smoke near the church. The guards, on approaching a paint can, recognized it as a bomb. One of the guards, Will Hall, moved the can to the side of the street where it exploded.

Mr. Johnson also testified that, in June 1958, just prior to the bombing, he and other church members were standing guard outside the church while a church meeting was being held. Mr. Johnson stated that appellant walked up to the church and asked to see Reverend Shuttlesworth so that Reverend Shuttlesworth could pray for him. After a guard refused appellant's request, appellant paused a moment and then walked away.

Aaron Rosenfield was the Fire Marshal during the time of the bombing. He had general training in the use of explosives, and had specifically studied the nature of dynamite. On the morning of the explosion Mr. Rosen-

field investigated the area around the Bethel Church. He observed a round hole near the church, and detected a distinct odor of dynamite. It was his opinion that dynamite had been used. Mr. Rosenfield also testified that he had periodically returned to the church, the last time being one or two years before the trial.

Sergeant E.H. Cantrell of the Birmingham Police Department testified that, just prior to the trial, he had made measurements at the place of the bombing. The distance from the explosion to Mark Roberson's house was some 132 feet. Mr. Cantrell also stated that his part of the investigation had been going on for some four or five years prior to the trial and the investigation report in this case was an "ongoing report."

Lieutenant Tom Cook, a retired Birmingham police officer, was also called to the scene of the church bombing immediately after the explosion. He saw a large hole near the church and noticed that the church was damaged.

Lieutenant Cook testified that he was involved in a conversation with appellant on June 21, 1958, a week before the bombing. Also involved in the conversation were a fellow officer, Captain G.L. Pattie, and a Klan member turned informer, Hugh Morris. Captain Pattie was deceased at the time of the trial.

The conversation occurred inside a parked car in a Birmingham hotel parking lot. The police officers were undercover and Cook introduced himself as "Ted" Cook, while Captain Pattie introduced himself as "Edwards."

The police detectives told appellant that they were Birmingham steel workers interested in "the movement." Captain Pattie told appellant that they were interested in a possible bombing similar to the unsuccessful attemp-

ted bombing of a Jewish synagogue the previous April. Captain Pattie said that they were interested in helping whoever had been doing this type of thing but they were not interested in a "dud" like the snyagogue bomb.

Lieutenant Cook further testified that appellant stated that he could handle any type of bombing and that he had people who were experts at bombing. If these people were paid, they would agree to set a bomb that would go off and damage almost any sort of building. Appellant allegedly claimed that for $2,000 he would get his people to make a bomb and place it wherever the officers suggested. No particular target was designated, but several targets were mentioned including the Bethel Church and the Birmingham News.

When the Bethel Church was mentioned by one of the officers, appellant replied that he knew where the church was and was familiar with the layout because he had been to the church. Appellant observed that the church would be difficult to bomb because of its all black neighborhood location, but he and his boys would bomb any place, including the Bethel Church.

Appellant then said that he could obtain explosives without signing for them. He also stated that he had seen a bomb already made up which consisted of loose dynamite placed in a bucket.

Lieutenant Cook testified that no agreement was made to bomb the church or any other target. The conversation ended when Lieutenant Cook told appellant that his group could raise the $2,000 and decide on a location and they would notify him.

The Bethel Baptist Church was bombed on June 29, 1958. On July 12, 1958, the same participants in the first

meeting met again at the same location. Lieutenant Cook testified that appellant began the meeting by stating that "his boys" had done the job and wanted their money. The officers then discussed with appellant the possibility that members of the Bethel Church had committed the bombing to get sympathy and attention. Appellant replied that "we four know they didn't do it and the blacks know they didn't do it." Appellant further stated that his boys had decided to go ahead with the bombing to ease the officers' fear of a botched job and to show the officers what type of job they could do. Appellant correctly described where the bomb had originally been placed and correctly described the bomb used.

Lieutenant Cook testified that, after the officers refused to pay $2,000, appellant asked for one-half the money and asked to be paid the other $1,000 on completion of another job. When the officers refused appellant replied that he was afraid to go back to his boys empty-handed. When Lieutenant Cook was asked if appellant specifically indiciated whether or not he had authorized the bombing, appellant's only reply was that he had unsuccessfully tried to call his boys and that he knew that they had come to Birmingham.

On cross-examination, Lieutenant Cook testified that Commissioner Conner wanted appellant to come to Birmingham to discuss the attempted bombing of the Jewish synagogue. Lieutenant Cook also testified that, after the second meeting, appellant never asked for the money.

At the close of Lieutenant Cook's testimony, the state rested. Appellant's first witness was Lieutenant Cook who was recalled to the stand. Lieutenant Cook

testified that his part of the investigation ended a few months after the second conversation with appellant and in his opinion the most fruitful investigation occured during the second meeting. Lieutenant Cook further testified that he did not know why the case was delayed but he stated that the investigators turned over all of the information they had to the Justice Department in Washington.

Lieutenant Cook, as well as other officers, had maintained surveillance of the Bethel Church before the bombing and some of these officers had attended meetings to insure that violence did not erupt. He also stated that the church was bugged on certain occasions.

Appellant next recalled Reverend Shuttlesworth to the stand. Reverend Shuttlesworth testified that, during 1958, police officers were frequently at church meetings. He further testified that the church members had objected to the presence of the officers.

The first time Reverend Shuttlesworth had seen appellant was just prior to the trial. Reverend Shuttlesworth noted appellant walked with a slight limp.

James Russell, one of the church guards in 1958, was called to the stand. Prior to the explosion, Mr. Russell was in the balcony of the church watching the parsonage. He did not see anyone place the bomb. He did not see the five-gallon bucket before it exploded, nor had he seen the appellant before the trial.

Dean Dawson, an employee of State Farm Insurance Company, took the stand. Mr. Dawson explained the procedure used by State Farm employees when seeking reimbursement for travel expenses. The employees were to keep a record of their travel when traveling on com-

pany business. He testified that the records would probably indicate where one of the employees was traveling on a given day.

Appellant recalled Fire Marshall Aaron Rosenfield. Mr. Rosenfield explained the uses and characteristics of dynamite. According to Rosenfield, lit dynamite fuses usually emit black smoke and would therefore be difficult to see on a dark night. Mr. Rosenfield doubted someone could smell dynamite as far as 130 feet away.

Appellant took the stand. Appellant testified that he was born in Walker County, Georgia, and was fifty-four years old. Appellant graduated from law school in 1952 and later began working for State Farm Insurance Company as a claims adjuster. He was assigned to Savannah and then Dublin, Georgia. At the time of the bombing, appellant was working out of Dublin.

Appellant traveled within a seventeen county area, adjusting claims. State Farm required him to keep a daily record of his expenses and submit the vouchers at the end of the week. The vouchers would reflect his whereabouts on any given day. Appellant testified that he had lost the carbon copies of these records. Appellant made inquiries to State Farm about these records, but he was informed that the records had been destroyed.

Appellant stated that, as a result of having polio when he was young, he had had a slight limp from the time he was 2 ½ years old.

Appellant testified that in June of 1958 he was staying with a friend outside of Atlanta. While appellant was out in the yard, Hugh Morris drove up. Morris told him that he wanted appellant to bomb Reverend Shuttlesworth's church in Birmingham, because someone out of

the state was needed. Appellant contended that Morris was inconsistent in explaining who wanted to hire him. In any event, Morris told appellant that a Birmingham group was willing to pay appellant for his services at a later date.

According to appellant, Morris later made a second visit stating that he did not have the money yet because the Birmingham group did not trust him. Morris asked appellant to come to Alabama to meet this group and discuss his services. Appellant stated that he was perplexed as to how Morris was able to find him in Georgia.

Appellant did later go to Montgomery to work for a segregationist gubernatorial candidate. Appellant met Morris at the candidate's house and Morris asked appellant to ride with him to Birmingham. Morris told appellant that he did not have the money to pay for the bombing but that he wanted him to meet the Birmingham group.

In a Birmingham hotel parking lot, appellant met two other men who Morris claimed would pay appellant $2,000 to bomb Reverend Shuttlesworth's church. The two men were Lieutenant Cook and Captain Pattie. Appellant claimed that the three men told him if a bomb did not get Reverend Shuttlesworth out of Birmingham they would pay to have him "eliminated."

Appellant further testified that the men said they did not have the $2,000 at that time but whenever they did they would pay him to bomb the Bethel Church. After the meeting Morris drove appellant by what Morris claimed was the Bethel Church. Appellant denied every being on the church grounds. The pair then returned to Montgomery. The explosion occurred the next weekend.

Appellant testified that, after the church was bombed,

Morris phoned him in Dublin, Georgia and told him that the Birmingham group wanted to see him again in Birmingham. Appellant agreed to meet the group, and an acquaintance, Richard Bowling, rode to Birmingham with appellant. Appellant met Morris at a Birmingham bus station, and rode with Morris back to the same hotel parking lot. Lieutenant Cook and Captain Pattie then joined the two men.

During this second conversation, appellant alleges that he asked the officers what they were up to and that the responses were contradictory. They first told him the blacks had bombed the church. Appellant further testified that Morris told him that the police had furnished him with a black informer who had bombed the church for $500. Appellant claims that the undercover agents wanted to talk with appellant this second time in order to offer appellant $10,000 to kill Reverend Shuttlesworth. The undercover agents never paid appellant any money.

After the second meeting, Morris and appellant met Richard Bowling. Appellant claims that Bowling knew about Morris, including the fact that he was a police informer, and that Morris and the undercover agents were trying to trap appellant. Appellant claimed he also knew this. Bowling allegedly confronted appellant with this information.

Appellant was asked why he participated in the two conversations if he knew he was being set up. He replied that Morris had earlier approached appellant offering to pay to have Martin Luther King, Jr., assassinated. Appellant testified that he felt that Morris's offers were an attempt "to entrap and send white people to jail merely because they believed in white supremacy and segrega-

tion." Appellant claimed he participated in the conversations to expose this plot to trap people.

Appellant was then asked if he had ever advocated the use of personal violence against any segment of society to which he replied that he had never advocated the use of such violence. Appellant also denied knowing anything about the design of bombs.

During cross-examination, the prosecution asked appellant if he had made certain extremely prejudicial statements concerning Jews and blacks, many of which advocated the use of violence. Appellant stated he did not remember making a few of the statements. However, he acknowledged that he had made some of the other statements or at least similar statements.

The prosecution then questioned appellant about the two conversations he had with Hugh Morris and the two undercover agents. Appellant denied that he offered to bomb Reverend Shuttlesworth's church or any other target. He further denied that the bomb was already prepared. Appellant also denied telling the officers during the second conversation that his boys had bombed the church.

Appellant claimed that he knew before the meeting that he was dealing with undercover agents attempting to have Reverend Shuttlesworth killed while appellant took the blame. Appellant admitted that he did not report this attempted set-up to local, state or federal authorities.

Appellant denied attempting to collect the $2,000 from the undercover agents., However, the appellant admitted that, while testifying in an earlier proceeding in Georgia, he testified that he had planned to take the $2,000. Appellant then admitted that he did try to collect

the money.

Appellant was then asked about his whereabouts on the weekend of the explosion. Appellant claimed that he had worked on Saturday morning of June 28, 1958. That afternoon, appellant returned to Dublin, Georgia and went to see a friend. He and his friend then drove south of Dublin to visit his friend's girl friend. That night around 10:00 the two men drove to Atlanta. The next morning appellant went by the post office and later returned to Dublin.

Apellant testified that he was the attorney for the National State's Rights Party. He acknowledged that he had on numerous occasions stated that the party was "the most white racist, anti-Nigger, anti-Jew organization in the entire world." Appellant had been chairman of the party since 1969. Appellant was also asked if he had made other quoted prejudicial remarks about blacks and Jews.

On redirect, appellant again denied involvement in the bombing.

Appellant's last witness was John Robert Stallworth, a retired school teacher. Mr. Stallworth met appellant in 1957. Mr. Stallworth stated that he did not personally like appellant because of his methods and terminology used in furthering the cause of "conversation." Mr. Stallworth testified that appellant told him to beware of Lieutenant Cook, Hugh Morris and Captain Pattie. Appellant allegedly then told Stallworth that he was going to get back at the officers "for what they were trying to do to him and get some money for nothing."

Mr. Stallworth claimed that appellant told him the men were trying to trap him and that Hugh Morris was

working for the police. Mr. Stallworth did not believe appellant had anything to do with the bombing.

Appellant first contends that the statute of limitations barred his prosecution and conviction.

The state argues that, as a procedural matter, appellant improperly raised his statute of limitations claim by including it with other matters in his "Plea of Abatement." Appellant also raised the issue in his motion for a new trial.

The state correctly states that § 15-15-(40-44), Alabama Code 1975, the statutory "plea of abatement," does not mention the statute of limitations. However, the code directs that, "In criminal proceedings, a plea is to be determined according to its substance, and not by its commencement or conclusion." § 15-15-3. This court has stated that "substance over form" is the rule in reviewing a plea. Although appellant does argue the abatement issue in his plea of abatement, numerous other issues are raised, among them the statute of limitations. That the pleading was entitled "Plea of Abatement" does not make the plea invalid. Simpson v. State, Ala.-Cr.App., 354 So.2d 317. cert. denied 354 So.2d 327 (1978).

Also, "in most of the cases it has been held that the statute of limitations is available under the general issue and need not be pleaded specially." 22 C.J.S. Criminal Law, § 449 (1961). The Alabama appellate courts follow this liberal procedure. This court has consistently held that the statute need not be specially pleaded. **Lambeth v. State**, Ala.Cr.App., 380 So.2d 925, cert. denied 380 So.2d 926 (1980); **Gambling v. State**, 22 Ala.App. 442, 116 So. 2d 507 (1928). In fact, this court has held that the state, as part of its burden of proof, must show that the

offense was committed within the statute. If such is not shown, the state fails to make out its case. **Harris v. State**, 54 Ala.App. 10, 304 So.2d 252 (1974).

In light of the court's preference of substance over form, and of the fact that the statute of limitations issue is part of the state's burden of proof, the issue is properly before this court.

However, we find that appellant's prosecution was not barred by the statute of limitations.

Alabama uses a capital/non-capital distinction in determing the applicable statute of limitations. Basically, with certain exceptions, under both the 1940 Code and the 1975 Code, a capital felony carries an unlimited statute of limitations (Tit. 15 § 219, Code of Alabama 1940; § 15-3-5, Code of Alabama 1975) and a non-capital case carries a three-year statute of limitations. (Tit. 15, § 221; § 15-3-1). At the time appellant allegedly committed the crime, the crime was a capital offense, Tit. 14, § 123, Code of Alabama 1940. Subsequently, the U.S. Supreme Court in **Furman v. Georgia**, 408 U.S. 238 (1972) declared the death penalty unconstitutional. At the time appellant was indicted, Alabama's new death penalty provision was in effect and did not include appellant's alleged felony. §§ 13-11-1 through 9, Code of Alabama 1975.

Appellant contends that, because of the Supreme Court's decision in **Furman**, supra, his felony was no longer a capital offense and thus carried a three-year statute of limitations under Tit. 15§ 221 1940 as of July, 1972, the date of the **Furman** decision. Appellant also contends that the fact that Alabama's new death penalty act which went into effect in March, 1976, did not include his felony is further reason to apply a three-year statute

of limitations.

We do not agree with appellant's contentions for a number of reasons.

Although this specific issue has not been decided in an Alabama criminal case, we agree with the Florida Supreme Court that the statute of limitations in a criminal prosecution is a substantive right, rather than being merely a procedural matter.

We believe that the Florida Supreme Court in **Manucy v. Wadsworth**, Fla. 293 So.2d 345 (1974) clearly and concisely addressed the issue. In **Manucy**, as in the present case, the defendant had committed the felony before the **Furman** decision invalidated Florida's death penalty. Appellant was arrested, subsequent to the decision but prior to the enactment of Florida's new death penalty provision which reinstated the death penalty for his crime. Florida's statute of limitations, like Alabama's, was based on a capital/non-capital distinction in which capital felonies carried no statute of limitations.

The Florida court, in rejecting defendant's argument that the two year "non-capital" statute of limitations should apply, stated:

"Petitioners therefore assert that the limitation statute should be given the status of procedure wherein the court looks to the limitation period in effect at the time of the arrest to determine whether the prosecution was timely instituted.

"[1] A review of the authorities indicates that the statute of limitations in force and effect at the time of the incident giving rise to the criminal charges is controlling in determing whether prosecution has been timely commenced.

"[2] Statutes of limitation in criminal prosecutions ('Limitation on Prosecution') are strictly creatures of statute; State v. Hickman, 189 So.2d 254 (Fla.App. 1966); and such are considered as vesting a substantive right, rather than being a procedural matter.

"'. . . Whenever, however, it so clearly appears that the time of the commission of the offense was so long ago as that the accused is protected from accusation by the statute of limitations, he may be awarded this right on habeas corpus. There is as much a denial of what we have called the first right of every accused person, by holding him to answer an offense for which he cannot be lawfully prosecuted, as there is for one wholly unsupported by proofs. Whether the question is properly raised by demurrer, by special plea, or by the general issue plea, makes no difference. The right of protection is not a mere right.

"[3] Therefore, the period of the statute begins to run from the time of the alleged criminal conduct. In United States v. Auto Rental Co., 187 F.Supp. 603, 605 (W.D. Pa. 1960), the criminal conduct arose out of the alleged illegal payments of money. There the court held:

"'. . . Of course, if all the money was paid prior to the 5-year period, the Statute of Limitations would bar prosecution. Protection from prosecution under a Statute of Limitations is a substantive right, and the actual date or dates of payment may be of vital importance to the defendants.'

"[4] In Florida, it has been held that the time of the commission of the offense is the point at which the court commences to have jurisdiction for the compu-

tation of the limitation period.

"To hold otherwise might be to create a situation which is clearly unconstitutional. This could allow the Legislature to enlarge the statute of limitations until the criminal in question was tried and sentenced; clearly an application which is ex post facto.

"[5] In the cases before us, the crimes were both allegedly committed prior to the decision in Furman v. Georgia, and therefore since the statutes of limitation are substantive, the two year period to institute prosecution is not applicable. [to bar the prosecution] (Footnotes omitted.)"

In adopting the reasoning and the law of **Manucy**, supra, we find that the trial court properly applied the statute of limitations in effect at the time of the crime.

Also, this court addressed the general issue of whether a statute in effect at the time of the crime controls or whether a subsequent new statute passed after its commission controls.

In **Hansen v. State**, Ala.Cr.App., 375 So.2d 564 (1979), the defendant committed the crime of murder on March 27, 1978. On April 27, 1978, the legislature enacted a law changing the method of jury selection. The defendant was indicted on May 12, 1978.

The court, in holding that the statute in effect at the time of the crime, not at the time of the indictment, controlled, stated:

"At the outset, we note that the Supreme Court of Alabama, in Bracewell v. State, Ala., [401 So.2d 123 (1979), reversed on other grounds, 449 U.S. 915, 1015 S. Ct. 312 (1980),] in determining the effective date of a statute applicable to juveniles, stated:

> **"Absent a clear expression in the Statute to the contrary, we think the law applicable at the time of the offense was intended to govern the offense, the offender, and all proceedings incident thereto, and we so hold.** [Emphasis added.]"

At the time of the appellant's commission of the crime, the statute was a capital offense. Since that statute controls in determining the statute of limitations, appellant's act carried an unlimited statute of limitations. § 15-3-5, Code of Alabama 1975.

Appellant filed a motion to quash the indictment alleging a due process violation resulting from the long delay between the commission of the crime and his indictment. Appellant specifically alleges that, because of the death of certain witnesses along with the loss of certain records and dimming of memories, he was denied a fair trial in violation of the due process clause.

The Supreme Court held in **United States v. Marion**, 404 U.S. 307, 92 S.Ct. 455 (1971), that a defendant's Sixth Amendment right to a speedy trial applies only to prosecutions formally begun, not to pre-accusation delays. Appellant does not argue a speedy trial violation.

Since appellant's prosecution is not barred by the statute of limitations, the possible due process violation must be addressed.

Although **Marion**, supra, recognized a due process protection separate from the statute of limitations, the due process clause has a limited role against oppressive delay, **United States v. Lovasco**, 431 U.S. 783, (7 S.Ct. 2044, (1977); **Chambliss v. State**, Ala.Cr.App., 373 So.2d 1185, cert. denied, Ala., 373 So.2d 1211 (1979), and mere passage of time per se is not a constitutional violation.

U.S. v. Lovasco, supra, **United States v. Doe**, 10th Cir., 642 F.2d 1206 (1981). A defendant is charged with a heavier burden of proof in showing a pre-indictment delay due process violation than in showing a denial of his speedy trial rights. The **Marion** court requires a showing by defendant of actual prejudice, not the mere possibility of prejudice, and that the delay "caused substantial prejudice to appellee's rights to a fair trial." The proof of actual and substantial prejudice due to the loss of potential witnesses must be "definite and non-speculative." This actual prejudice must be shown and cannot be presumed. **Marion**, supra; **Chambliss**, supra.

The cental question becomes whether appellant met the heavy burden of proof by showing an actual and substantial prejudice resulting from the lenghty delay. We hold that he did not.

Appellant, in attempting to prove "actual prejudice," argued that the memories of witnesses had dimmed during the delay. However, in light of the protection afforded by the applicable statute of limitations, diminished recollection alone does not constitute substantial prejudice. **Marion**, supra.

More significantly, appellant claimed actual prejudice resulted from the death during the pre-indictment delay of certain potential witnesses, who, he alleges, would have testified in a manner significantly beneficial to his defense. The only "proof" appellant offered in showing actual prejudice were affidavits that he alleged contained what the potential witnesses would have testified to at trial.

The offered affidavits are simply self-serving assertions which do not **prove** actual prejudice. The affidavits

are bare allegations of what the potential witnesses would have said with no extrinsic support in the record. The nature of such affidavits is much too speculative and non-definite to meet the heavy burden of proof required by **Marion**. Merely because appellant alleges that certain dead witnesses would testify for him and in a certain manner does not prove that the potential witnesses would testify in such a manner or even testify at all. We cannot accept such self-serving declarations as proof of actual prejudice resulting from the absence of these witnesses, and the affidavits alone do not satisfy the requirements of **Marion**.[1] **United States v. Hauff**, 7th Cir., 395 F.2d 555, 556 (1968); **United States v. Mays**, 9th Cir., 549 F.2d 670, 674 (1977); **United States v. Revada**, 8th Cir., 593 F.2d 293, 296 (1979), 10th Cir., 574 F.2d 1047 (1978); **United States v. King**, 7th Cir., 593 F.2d 269 (1979); **United States v. Saunders**, 9th Cir., 641 F.2d 659, 665 (1980); **United States v. Mills**, 9th Cir., 641 F.2d 785, 789 (1980); **United States v. Surface**, 5th Cir., 624 F.2d 23, 25 (1981); See also Judge Barnett's concurring opinion in **United States v. Radsvall**, 10th Cir., 591 F.2d 548 (1978).

[1] The lack of supporting evidence that would tend to prove that the potential witnesses would testify as appellant claims would perhaps not be considered as adversely to appellant in a situation where he had no notice of the possibility of a criminal indictment. However, the heart of appellant's defense is the allegation that he was being "set up" or entrapped. It follows that appellant, a licensed attorney, would be aware that he would very likely be charged with the bombing some time in the future.

Even if we speculate that the potential witnesses would have testified as appellant claims they would in his affidavits, we believe that the lack of most, if not all, of the allegedly lost testimony does not constitute actual prejudice.

First of all, much of the alleged testimony is rank hearsay, and it would be highly speculative as to whether a good deal of the alleged testimony would even be admissible. For example, appellant claims that one potential witness would have testified "that appellant told him that Hugh Morris claimed, etc."

Also, it is contested as to whom the testimony alleged in the first affidavit would benefit. Appellant claims that the potential witness would have testified that Hugh Morris, the informer, told appellant that he had hired someone else to bomb the church in order to gain appellant's confidence. However, the state argues that the alleged testimony might help the state. In light of Cook's testimony that appellant was anxious to participate in the bombing, the alleged testimony may have been further evidence that appellant, as an accomplice, had started the process that ultimately led to the bombing.

A second affidavit alleged that another of appellant's deceased friends would have testified that appellant told him that appellant knew Hugh Morris and the others were trying to trap him and that he was "playing them along." If we ignore the great speculation that the potential witness would have even been allowed to testify to appellant's self-serving declaration as evidence of the matters declared, the alleged testimony would have been at best cumulative and would have added little to appellant's defense. At the trial, John Robert Stallworth testified to essentially

the same thing. Appellant also gave the same account when he took the stand.

Finally, two of the four affidavits deal with potential alibi testimony which appellant claims would place him in Georgia at the time of the bombing. Appellant also contends that certain State Farm Insurance Company employee records would tend to prove the same. However, the trial court noted and the state concurred that appellant was on trial as an accomplice. There was never any contention by the state that appellant had actually ignited the bomb.

Moreover, even if the appellant had proven actual prejudice, the Supreme Court has held that proof of actual prejudice is generally a necessary but not a sufficient element of a due process claim. Proof of actual prejudice is only the first step. If such proof is given, then the focus turns to the reasons for the delay. **Lovasco**, supra. **Marion** held that evidence of an intentional delay by the state to gain a tactical advantage would be a due process violation. **Lovasco** apparently includes evidence of "reckless disregard of circumstances known to the prosecution . . ." 431 U.S. at 796, n. 7.

We are hampered by our search in determining reasons for the delay because of the meager evidence on this issue in the record. In essence, no real reason can be found in the record. Thomas Cook, the Birmingham policeman who participated in the conversation with appellant, stated that he did not know why the prosecution was delayed and that he had no reason to believe any other evidence would have been forthcoming after the conversations. However, the other state investigators at least imply that the investigtion had continued after two

conversations with appellant. A fire and bombing expert testified that he had periodically returned to the site of the bombing, and a Birmingham police officer testified that the investigative report was an "ongoing report" and that his part of the investigation had been going on since four or five years previous to the trial.

During a post-trial hearing appellant placed both prosecutors on the stand. Neither prosecutor had been involved with the case before the indictment had been returned, and neither could give a reason for the delay. The prosecution did expressly deny that the delay had been more advantageous to the state than the appellant.

The only other reference to the subject arose during a post-verdict discussion in which appellant alleged that the state purposely delayed to gain a tactical advantage. Appellant claimed that the state, fearing a verdict from a 1958 all-white jury, deliberately delayed until blacks were allowed to serve. Appellant offered absolutely no proof of this allegation. After appellant alleged such an improper delay, the following discussion occured:

> "THE COURT: I doubt if anybody sat down in 1958 and said we have to wait until the jury system isn't all white.
>
> "MR BUCKLEY: [appellant's counsel]: I think they may have said we can't get a conviction.
>
> "THE COURT: That very well may have been. This prosecution will not be successful **on this evidence.** (Emphasis added.)
>
> "MR BUCKLEY: That's what I assume.
>
> "THE COURT: I would almost find that as a fact for the reason of delay the State did

not feel they would successfuly prosecute in 58. Would you?

"MR. DUNN: [prosecution]: I would say it would be a fair statement but not the reason of the jury."

The state also denies appellant's assertion of improper delay in its brief and arguments before the court, claiming that the prosecution delayed because it felt that it did not have enough evidence to convict in 1958 in light of the relatively weak evidence then gathered. As stated before, there is at least an implication from the record that the investigation had not closed in 1958. The court in **Lovasco**, supra, noting the lack of evidence on the issue in the record, accepted the arguments of the government that the government delayed for investigative reasons. The court held that, even if prejudice were shown, such delay did violate due process. See also **United States v. Surface**, 5th Cir., 624 F.2d 23 (1980).

In any event, without any proof in the record, we will not assume from the record that the state intentionally delayed to gain a tactical advantage or made a knowingly reckless disregard of appellant's ability to defend himself. Appellant's bare allegations of improper tactical delay on the state's part is insufficient to establish the necessary malevolent purpose. **United States v. Medina-Arrellano** , 5th Cir., 569 F.2d 349 (1978).

A calculated delay hurts the prosecution just as much as the defense. Since the prosecution in a criminal case has the burden of proving its case beyond a reasonable doubt and to a moral certainty, dimmed memories, evidence and unavailable witnesses have a special impact on the burden cast upon the prosecution. In light of the

presumption of innocence, and the burden of proof, no prosecution could reasonably believe that a nineteen-year delay in a case would improve the chances of a conviction. Indeed, the state lost the testimony of Captain Pattie, Commissioner Conner and Will Hall, the church guard who moved the bomb. A conviction was gained in the case inspite of the long delay. See **Chambliss**, supra.

We find that the pre-accusation delay did not violate due process guarantees.

Appellant also argues that there was not sufficient evidence for the jury to convict appellant. Appellant basically relies on one sentence in the record in which Lieutenant Cook, when asked if appellant had specifically authorized his boys to bomb the church, replied that appellant only stated he had unsuccessfully tried to call his boys and that he knew they had come to Birmingham.

This court, in **Chambliss**, supra, addressing the same issue, stated:

> "We have held on numerous occasions that, where there is legal evidence from which the jury can by fair inference find the accused guilty, this Court has no right to disturb the verdict; (Alabama Digest, Criminal Law, Key 1159.2(8). Whether there is such evidence is a question of law, its weight and probative value are for the jury.
>
> "A reviewing Court does not determine if the evidence proved defendant's guilt beyond a reasonable doubt and to a moral certainty but rather whether there was legal evidence presented from which the jury could draw an infer-

> ence of guilt; where legal evidence is presented at trial from which the jury can, by fair inference, find the accused guilty, the reviewing court will not disturb the verdict of the jury. Daniels v. State, Ala.Cr.App., 343 So.2d 566.
> "In Young v. State, 283 Ala. 676, 220 So.2d 843, the Supreme Court said:
> "'Where the evidence presented raises questions of fact for the jury, and such evidence, if believed, is sufficient to sustain conviction the denial of a motion to exclude the state's evidence, the refusal to give the affirmative charge and the overruling of a motion for new trial does not constitute error.'"

We believe there is indeed sufficient evidence, if believed by the jury, to sustain appellant's conviction. There is testimony that, during the meeting immediately prior to the bombing, appellant bragged that he and his boys were experts at bombing and would bomb any target for $2,000, **including Reverend Shuttlesworth's church**. Appellant also at this meeting described a bomb already made matching the description of the bomb used. Appellant finally told the officers that he had been on the church grounds and studied its layout. This testimony was corroborated by a church member.

One week later the church was bombed.

There is testimony that appellant began the bombing subsequent to the bombing by claiming that his boys had done the bombing and "they wanted their money." When asked why his boys had gone ahead with the bombing, appellant responded that they wanted to ease concern about their competence. Appellant also gave a

description of the bomb used and exactly where it was originally located that matched the description given by the church guards. Finally, appellant allegedly agreed to take $1,000 for the Suttlesworth bombing and bomb another target for the remaining $1,000.

This court has held that a defendant is charged with the foreseeable consequences of any joint enterprise or conspiracy whether he directly authorized or contemplated the act or not. **Howell v. State**, Ala.Cr.App., 339 So.2d 138 (1976). Likewise, a defendant will also be held responsible for any act that a reasonable person could infer would result from such joint enterprise or conspiracy. Witherspoon v. State, Ala.Cr.App., 356 So.2d 743 (1978).

To be an accomplice in a crime one need not enter any formal agreement or express conspiracy. All that is needed is a community of purpose, and a community of purpose can be formed in a flash. **Landry v. State**, 56 Ala.App. 421, 321 So.2d 759 (1975). Community of purpose is normally proven by the conduct of the parties rather than by direct evidence. **Stinson v. State**, 55 Ala.App. 629, 318 So.2d 325, cert. denied, 294 Ala. 772, 318 So.2d 329 (1975).

Allegedly, after studying the church and its layout, appellant offered to bomb the church for a price. Appellant gave a general description of the type of bomb ultimately used. The church was bombed, appellant correctly described the bombing, and appellant demanded payment. This evidence, is believed, is certainly "legal evidence presented from which the jury could draw an inference of guilt" and as such this court will not disturb the verdict of the jury.

Appellant next asserts that certain questions asked appellant concerning his views of the use of violence against minorities and his views of minorities in general constituted reversible error. We do not agree.

Appellant, just prior to his questioning on this issue, emphatically stated that he had never advocated the use of violence against other segments of society. The majority of statements appellant was questioned about dealt with such use of violence. Thus the questioning was properly conducted to impeach the witness.

Also, the remaining statements, if not directly advocating violence, certainly evidenced an intense hatred and aversion towards blacks and Jews. Such questioning was proper to prove motive for the bombing. This court in **Chambliss**, supra, in finding that certain testimony elicited which linked appellant with the Ku Klux Klan, was proper, held that:

> "In cases where, as here, the evidence is circumstantial, a wide range of testimony is admissible to show the motive of defendant for committing the crime charged. Turner v. State, 224 Ala. 5, 140 So. 447, Harden V. State, 211 Ala. 656, 101 So. 442.
>
> "In a case where the evidence is circumstantial, evidence of motive becomes of great importance. Harden v. State, supra; Hardy v. State, 51 Ala.App. 489, 286 So.2d 899. When circumstances point to the guilt of an accused, evidence of his motivation, even though weak, is admissible."

The record contains ample circumstantial evidence from which a jury could reasonably draw an inference of

guilt. (1) Appellant himself admitted meeting the undercover agents and discussing the bombing of the Bethel Church before the bombing occurred. (2) He further admitted that, shortly after the bombing, knowing that he had previously discussed the bombing of this church and that the church had been bombed, he agreed to meet with the undercover agents again. (3) There was testimony from a church member that appellant was seen at the church prior to the bombing. (4) Lieutenant Cook also testified that appellant had been to the church and studied its layout. (5) There was testimony that, during the first meeting, appellant bragged about how he and "his boys" could handle any type of bombing, including bombing the Bethel Church. (6) There was also testimony that during this first meeting, appellant gave a general description of the bomb already constructed that matched the description of the bomb ultimately used. (7) After the first meeting, the Bethel Church was bombed. (8) There was testimony that, at the second meeting, appellant told the officers that his boys had committed the bombing and wanted their money. (9) Appellant correctly described the bomb used and where it was originally placed, according to the testimony of Lieutenant Cook.

Appellant's final contention is that Jefferson County's "one for one" strike method, in comparison to a defendant's "two for one" strike method in other counties, is unconstitutional in that it violates due process and equal protection under the law. This court had upheld the constitutionality of such procedure. **Tucker v. State**, Ala.Cr.App., 383 So.2d 579, cert. denied, 383 So.2d 586 (1980).

The judgment of conviction is affirmed.
AFFIRMED.
All the Judges concur.

APPENDIX C

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P.O. BOX 351
MONTGOMERY 36101

JOHN O. HARRIS
Presiding Judge
JOHN C. TYSON, III
JOHN P. DeCARLO
WILLIAM M. BOWEN, JR.
BISHOP BARRON
Judges

August 20, 1982

MOLLIE JORDAN
Clerk

Mr. J.B. Stoner
P.O. Box 1211
Marietta, GA 30061

RE: Jessie Benjamin Stoner v. State, 6 Div. 342,
Jefferson Circuit Court No. CC 80-00024

Dear Mr. Stoner:

The Court of Criminal Appeals has today granted a stay of sixty (60) days from August 13, 1982, to allow filing of a petition for writ of certiorari in the United States Supreme Court. This stay will remain in effect until action is taken on the petition, and if petition is granted, until a decision is rendered by the United States Supreme Court.

The certificate of final judgement has been recalled from the lower court pending determination by the United States Supreme Court, **but the certificate will be reissued upon the expiration of the sixty-day stay unless this Court is furnished with proof of the filing of said petition in the United States Supreme Court.**

Yours very truly,
s/Mollie Jordan
Clerk

xc: Clerk, Jefferson Circuit Court
Office of the Attorney General
File

APPENDIX D

Supreme Court of the United States

No. A-320

JESSE BENJAMIN STONER,

Petitioner

v.

ALABAMA

ORDER EXTENDING TIME TO FILE PETITION FOR WRITE OF CERTIORARI

Upon Consideration of the application of counsel for petitioner

It It Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 11, 1982

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 1st
day of October, 1982

APPENDIX E

THE ALABAMA COURT OF CRIMINAL APPEALS
Montgomery, Alabama

6th Div. 342, Jefferson Circuit Court, RE:CC 80-00024

JESSE BENJAMIN STONER

Appellant

vs

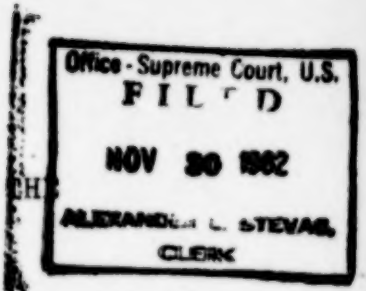
THE STATE

Appellee

Dear Sir: This is to advise you that on May 18, 1982, the Court of Criminal Appeals announced decision of:
application for rehearing overruled
No opinion.

in the above stated cause.

Yours truly,
MOLLIE JORDAN, CLERK



NO. 82-796

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1982

JESSE BENJAMIN STONER,

PETITIONER

V.

STATE OF ALABAMA,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND COURT OF
CRIMINAL APPEALS OF ALABAMA

BRIEF AND ARGUMENT IN OPPOSITION TO THE WRIT

OF

CHARLES A. GRADDICK
ATTORNEY GENERAL

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
250 Administrative Building
64 N. Union Street
Montgomery, Alabama 36130
(205) 834-5150

ATTORNEYS FOR RESPONDENT

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OFFICE OF THE ATTORNEY GENERAL
250 Administrative Building
64 N. Union Street
Montgomery, Alabama 36130
(205) 834-5150

ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

1. Does the Decision and opinion of the Court of Criminal Appeals of Alabama conflict with any prior controlling decision of this Honorable Court:

A. As to the distinction between the "right" to be speedily prosecuted and the right to be speedily tried once a prosecution is initiated?

No.

B. As to the proposition that delay between a crime and the initiation of prosecution which is neither willful nor unreasonable nor prejudicial to the accused does not reach constitutional proportions?

No.

2. Was the Petitioner denied equal protection of the laws by the Alabama Courts' refusal to hold that this Honorable Court's decision in Furman v.

Georgia (408 U.S. 238 [1972] ipso facto placed a three year statute of limitations on the state statutory offense of setting off dynamite dangerously near an inhabited dwelling? No.

PARTIES

In the Honorable Circuit Court of Jefferson County, Alabama, the Court of Criminal Appeals and the Supreme Court of Alabama, the parties were Jessie Benjamin Stoner, also known as Jesse Benjamin Stoner and J. B. Stoner, Petitioner herein, and the State of Alabama, Respondent herein.

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OPINIONS BELOW

The decision and opinion of the Court of Criminal Appeals of Alabama affirming the Petitioner's conviction is reported as follows:

Stoner v. State, (Cr. App. Ala., 1982) 418 So. 2d 171

The order of the Supreme Court of Alabama denying the Petitioner a writ of certiorari is reported as follows:

Ex parte: Stoner; In re: Stoner v. State, (S. Ct. Ala., 1982) 418 So. 2d 184

JURISDICTION

The Petitioner has invoked this Honorable Court's Jurisdiction under 28 U.S.C. 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner is advancing an alledged claim under the Fourteenth Amendment to the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

Title 15, Section 219, Code of Alabama, 1940, which reads as follows:

> "§219. Offenses as to which there is no limitation. -There is no limitation of time for any public offense which may be punished capitally, or for murder in the second degree, manslaughter in the first degree, arson, forgery, counterfeiting, or any offense expressly punishable, under the provisions of this Code, as forgery or counterfeiting." (Title 15, Code of Alabama 1940)

STATEMENT OF THE CASE

The Petitioner, Jessie Benjamin Stoner, also known as Jesse Benjamin Stoner and J. B. Stoner, was indicted for the setting off of dynamite or other explosive in, under or dangerously near the dwelling house of Mack E. Roberson[1] by the Grand Jury of

---

[1] "§123. Exploding or setting off dynamite; penalty for.-Any person who wilfully sets off or explodes any dynamite or other explosive in, under or dangerously near to any steam boat or vessel or railroad car in which there is at the time any human being, or any prison or jail or any other house or building which is occupied by a person lodged therein or any inhabited dwelling house or any house adjoining such house whether there is at the time in such house adjoining a dwelling house a human being or not shall on conviction be punished at the discretion of the jury by death or by imprisonment in the penitentiary for not less than ten years." (Title 14, Code of Alabama, 1940)

Jefferson County, Alabama, at its September, 1977, Session. (R. pp. 463-464)

On January 11, 1980,[2] the Petitioner was arraigned on the indictment and pleaded not guilty. February 8, 1980, was set as the trial date. (R. p. 467)

On February 6, 1980, the Petitioner filed a plea in abatement attacking the form of the indictment and raising the statute of limitations. On the same date the Petitioner filed a "Plea in bar" alledging a denial of speedy trial under the Fifth, Sixth and Fourteenth Amendments and alleging intentional delay in presenting the case to Grand Jury.

---

[2]The delay was occasioned by Petitioner's resistance to extradition from Georgia. See Stoner v. Hutson, 244 Ga. 52, 257 S. E. 2d 539 (1979), cert. den. 444 U.S. 967, 62 L. Ed. 2d 379, 100 S. Ct. 445.

After a hearing these motions were overruled. (R. pp. 2-40 and 468-482)

The cause came on for trial on May 12, 1980, before Honorable Charles R. Crowder, a Circuit Judge, and a jury. The Petitioner was attended by his attorneys, Honorable Elno A. Smith, Jr., Honorable Robert R. Creel and Honorable Travis Buckley. The State was represented by Honorable Earl C. Morgan, District Attorney, Honorable Burton Dunn, Assistant District Attorney and Honorable John A. Yung IV, Assistant Attorney General. On hearing the evidence, arguments and charge of the Court, the jury returned a verdict of guilty and a sentence of ten (10) years imprisonment. The Petitioner was adjudged guilty and sentenced in accordance with the verdict on May 14, 1980, and gave notice of appeal at the same time. (R. pp. 509-510)

On June 5, 1980, the Petitioner moved for a new trial, the same being denied on September 10, 1980. (R. pp. 514-522)

On April 20, 1982, the Court of Criminal Appeals of Alabama affirmed the Petitioner's conviction. On the matters at issue here the appellate court expressly relied on and followed this Honorable Court's decisions in United States v. Marion, (404 U.S. 307, 30 L. Ed. 2d 468, 92 S. Ct. 455 [1971]) and United States v. Lavasco, (431 U.S. 783, 52 L. Ed. 2d 752, 97 S. Ct. 2044 [1977]) The Court of Criminal Appeals found no denial of due process in the pre-indictment delay because it was not intentional nor unreasonable. On the issue of prejudice to the Petitioner, the Court of Appeals found that the evidence

allegedly lost by the passage of time consisted of either "rank heresay" (418 So. 2d 171, 180), evidence that actually was incriminating and alibi evidence. The alibi evidence was irrelevant in this case since it was never suggested that the Petitioner actually placed the bomb at the church near Mr. Roberson's house. Stoner v. State, (Cr. App. Ala., 1982) 418 So. 2d 171.

The Court of Criminal Appeals denied Stoner's application for rehearing on May 18, 1982. Ibid.

The Supreme Court of Alabama denied Stoner's petition for a writ of certiorari on August 13, 1982. Ex parte: Stoner, (S. Ct. Ala., 1982) 418 So. 2d 184

STATEMENT OF THE FACTS

The evidence on which this Petitioner was convicted is well analyzed in the opinion of the Court of Criminal Appeals of Alabama, which is before this Honorable Court. Stoner v. State, (Cr.App. Ala., 1982) 418 So. 2d 171. Rather than burden the record with another recital, the Respondent State will limit itself to the facts relating to the issues presented.

Sometime after July of 1958, the information produced by the Birmingham Police Department's investigation was turned over to the United States Justice Department. (R. pp. 279)

After turning the matter over to the Federal Justice Department, the Birmingham Police Department directed its main energies elsewhere, but the investigation into the church bombing was

never closed. The City Fire Marshall's Office continued the case; Fire Marshall Aaron Rosenfeld visited the scene of the bombing many times over the years, the last time a year or two before the trial. (R. p. 188) The Birmingham Police Department also continued its investigation. Detective Cantrell, who testified at trial, and Detective Legrande, who died shortly before the trial, had been involved in what they considered an "ongoing report" for five years before trial, and Cantrell had no idea how long the investigation had been going on before then. (R. pp. 188 and 208-209)

The Petitioner submitted several affidavits and one letter in an effort to show prejudice to him.

The Petitioner's affidavit as to what Mark Richard Bolling, deceased, would testify if he had been available can be summerized as follows: Around the time of the bombing the Petitioner allegedly made several statements to the effect that he, the Petitioner, knew that Hugh Morris was an "enemy agent" (i.e. a police informer) and that he, the Petitioner, was trying to prove entrapment, find out what Morris was up to and possibly collect $2,000.00 for doing nothing. The affidavit also alledges that a meeting occured between Bolling, Morris and the Petitioner in which Morris allegedly admitted bombing the church "..to convince J. B. Stoner [the Petitioner] to trust him (Hugh Morris)...." (R. p. 554) The affidavit does not suggest that the Petitioner in

anywise protested or took issue with Morris' alleged statement. Finally, although no one has any idea who actually placed the bomb at the church, Bolling would allegedly have vigorously protested his innocence in the affair. (R. pp. 551-557)

A letter, Defense Exhibit 6, states that the Petitioner's employer no longer has records dating back to 1958 which might throw light on the Petitioner's whereabouts on the date of the bombing. (R. p. 558)

The Petitioner's affidavit concerning the alleged testimony of Ralph Barron, deceased, was to the effect that in early May, 1958, Morris allegedly came to Barrons' service station and made inquiries entirely consistant with Morris informer's status, later when the

incident was recounted to the Petitioner, ha, the Petitioner, allegedly stated that he knew that Morris was an informer. (R. pp. 559-560)

The Petitioner also submitted two affidavits by him to the effect that two deceased persons would have provided him with an alibi for the date of the bombing. (R. p. 561-563)

ARGUMENT

I.

ON PRE-INDICTMENT DELAY

The Petitioner claims conflicts between the decision of the Court of Criminal Appeals and the decisions of this Honorable Court and other courts. Most of these cases are speedy trial cases, and this Honorable Court has held that the right to a speedy trial does not attach until the accused is indicted or arrested. United States v. Marion, 404 U.S. 307, 30 L. Ed. 2d 468, 92 S. Ct. 455 (1971); United States v. Lavasco, 431 U.S. 783, 52 L. Ed. 2d 752, 97 S. Ct. 2044 (1977); United States v. McDonald, ____ U.S. ____, 71 L. Ed. 2d 696, 102 S. Ct. _____ (1982) The Alabama Courts followed this Court's teachings in these cases.

Rather than burden this Honorable Court with a lengthy discussion distinguishing obviously distinguishable cases, the Respondent State will discuss only one case which is in apparent conflict with the holding of the Alabama Courts: Leonard v. Hay, (S. Ct. W. Va, 1980) 269 S.E. 2d 394 (Note: The Petitioner cites this case as "State v. Hay")

An examination of Leonard is very useful in judging the alleged conflicts between this Court's prior holdings and that of the Alabama Courts in this case, because Leonard unlike most of the other cases relied on by the Petitioner involved exclusively pre-indictment delay and the Court held in the accused's favor. However, in so holding the West Virginia Court expressly rejected this Court's holdings in Marion (supra) and Lavasco (supra) and decided the case

under Dickey v. Florida,[3] a classic speedy trial case predating Marion and Lavasco. The Supreme Court of West Virginia expressly refused to decide the case under the Federal Constitution and followed West Virginia law instead.[4] Later West Virginia cases have underscored Leonard's speedy trial approach to pre-indictment delay. In State v. Maynard, ([S. Ct. W. Va., 1982] 289 S. E. 2d 714) and State v. Ayers, ([S. Ct. W. Va., 1981] 282 S. E. 2d 876) the Court quite seriously applied the

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3"...Dickey v. Florida, 398 U.S. 30, 90 S. Ct. 1564, 26 L. Ed. 2d 26 (1970) is more in point...." (269 S. E. 2d 394, 397)

4"...we need not interpret federal law to define due process or Sixth Amendment rights because we have our own state due process and speedy trial provisions...." (269 S. E. 2d 394, 397)

Leonard rule to pre-indictment delays of only a few months.[5] Even West Virginia's speed trial rule is a departure from that taught by this Honorable Court. For example, in Sigman v. Whyte, ([S. Ct. W. Va., 1980] 268 S. E. 2d 603) the Court cited Leonard for the proposition that:

> "The passage of time alone will make it impossible to proceed with criminal charges..." (Emphasis supplied)

Compare Barker v. Wingo, (407 U.S. 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 [1972]) holding that in post-indictment speedy trial issues the length of the delay is a triggering device (407 U.S. 514, 530, 33 L. Ed. 2d 101, 117) and one of four

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[5]Obviously, West Virginia would be greatly hindered in running the long range undercover operations against orgainized crime or public coruption which prove so successful elsewhere.

co-equal factors by which speedy trial is measured. If the decision of the Alabama Courts in this case conflicts with Leonard it is because Alabama unlike West Virginia follows the teachings of this Honorable Court on both pre-indictment and post-indictment delay.

As this Honorable Court has recognized in Marion (supra), Lavasco (supra) and McDonald (supra), there are vast differences between pre-indictment and post-indictment delay. Once an accused is formally charged either by indictment or arrest, he has the right to a speedy trial. Dillingham v. United States, 432 U.S. 64, 46 L. Ed. 2d 205, 96 S. Ct. 303 (1975). But, no one has the right to be arrested or prosecuted. Hoffa v. United States, 385 U.S. 293, 17 L. Ed. 2d 374, 87 S. Ct. 408 (1966). The right to decide if and when to institute

a prosecution is in the prosecutor. The Confiscation Cases, 7 Wall 454, 19 L. Ed. 196 (1869); United States v. Cox, (5th Cir. 1965) 342 F. 2d 167, cert. den. sub. nom: Cox v. Hauberg, 381 U.S. 935, 14 L. Ed. 2d 700, 85 S. Ct. 1767, both cited with approval in United States v. Nixon, 418 U.S. 683, 693, 41 L. Ed. 2d 1039, 1055, 94 S. Ct. 3090 (1974) See also Bass Anglers, etc. v. U.S. Steel Corp., (S.D. Ala., 1971) 324 F. Supp. 412, Aff'd sub nom Bass Anglers, etc. v. Koppers Co., (5th Cir., 1971) 447 F. 2d 1304. In exercising his or her discretion a prosecutor must balance various factors: Would further investigation strengthen the case or would the delay result in the loss of evidence? Would an institution of proceedings at this point help or hinder efforts to identify co-conspirators. What effect would a prosecution

have on existing undercover operations. Are there alternatives to prosecution? Not the least of these considerations is whether the prosecution has some chance of success. All of these factors must be weighed against the statute of limitations, which in most cases provides an absolute deadline for instituting the prosecution and the proposition that once the prosecution is instituted, the accused's right to a speedy trial attaches.

This much is history: This case arose in the South during the reign of terror instituted by radical lawless groups in opposition to the Civil Rights Movement. Conspiracy, terrorism and bombings each present serious practical problems for any due process system of justice, but in dealing with racist violence during this period Alabama

officials were often confronted with all three together in the same case. Diligent officials were also confronted with a certain degree of public sympathy for and fear of the terrorists, which often surfaced in judges and juries. For example: when months of painstaking work by the Montgomery, Alabama, Police Department produced an arrest for a church bombing, the preliminary hearing judge, over vehement objection by the State, allowed the defendants, to plead guilty to disturbing religious worship and fined them ten dollars each. Several strong homocide cases personally prosecuted by the Attorney General of Alabama as well as the local District Attorneys ended in acquitals. These cases were then successfully prosecuted in Federal Court under the Civil Rights Statutes. Problems also arose as a

result of mistrust and, therefore, lack of co-operation, between state and federal agencies. For example, on September 15, 1963, a bomb detonated at the Sixteenth Street Baptist Church in Birmingham, killing three children. The Birmingham Police and the F.B.I. independently investigated the incident. The F.B.I. found a fishing bobber at the scene but had no idea if or how it related to the case, while the Birmingham Police had a statement from one Robert Edward Chambliss that he knew how to make a bomb timer using a bucket of water and a fishing bobber. It was more than ten years before these two items of evidence were put together to make part of a case against Chambliss. See Chambliss v. State, (Cr. App. Ala., 1979) 373 So. 2d 1185, 1193 & 1200.

It was in this context that the decision to prosecute in this case was first delayed and finally made. With juries returning acquitals in stronger cases there seemed little point in presenting this case to a grand jury, when further investigation might well strengthen it[6] as well as identify the persons who actually placed the bomb. On the other hand, once this prosecution was instituted the undercover operation would of necessity be revealed, ending a means

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[6]Of course, in judging the strength of the State's case the prosecutors could not possibly have known that the Petitioner would strengthen the State's case by (1) admitting his meeting and negotiations with the undercover officers, (2) presenting a ludicrous defense and (3),being one of the nation's most infamous racists and notorious advocates of violence, would sware that he had never advocated personal violence against any segment of society.

of learning about future terrorist activities. Faced with little chance of success in State Court, the state officials submitted their evidence to the Federal Justice Department, for all they knew the F.B.I. had enough other evidence to flesh out the case and obtain a conviction. Then, faced with the fact that the Justice Department never did bring a prosecution and that the 1975 Code of Alabama would impose a statute of limitations forever barring the prosecution, the matter was presented to the Grand Jury and an indictment obtained.

The Learned Trial Judge and the Court of Criminal Appeals found that the delay in presenting the case to the Grand Jury was not the result of an intentional decision and that the case had been held open throughout the period. If the delay

produced little new evidence, this was not something which could have been foreseen; there was reason for the delay. The Court of Criminal Appeals rejected the Petitioner's self serving affidavits as a showing of prejudice but the Court also found that even on their face, these affidavits presented no evidence of prejudice. Obviously, if these witnesses had been alive they would not have been permitted to testify to the Petitioner's self serving declarations. The Petitioner's silence in the face of Morris' alleged statements concerning the bombing would have been an admission against interest; this was incriminating not exculpating evidence. Finally, the Petitioner's alibis were irrelevant, since the Petitioner admitted meeting with the undercover officers and there was never any question that the

Petitioner had actually placed the bomb at the church. The Petitioner has been badly crippled from childhood and had a perfect defense to any suggestion that he physically placed the bomb at the church under the noses of armed guards and ran away. The Petitioner was accused and convicted as an accomplice - one who procurred, assisted or encouraged the bombing. It was not necessary that he be in Birmingham or Alabama or the United States, for that matter, when his co-conspirators placed the bomb.

The Alabama Courts decided this case under the rules laid down by this Honorable Court in cases like United States v. Marion, (404 U.S. 307, 30 L. Ed. 2d 468, 92 S. Ct. 455 [1971]); United States v. Lavasco, (431 U.S. 783, 52 L. Ed. 2d 752, 97 S. Ct. 2044 [1977] and

United States v. McDonald, (____ U.S. ____, 71 L. Ed. 2d 696, 102 S. Ct. ____ [1982]). If the decision of the Alabama Courts conflicts with the holdings of other jurisdictions, it is because these other jurisdictions are following their own law. There is no conflict between the holding of the State Courts in this case and any decision or opinion of this Honorable Court.

III.

ON THE STATUTE OF LIMITATIONS

On June 28, 1958, the statute of limitations applicable to the Petitioner's crime read as follows:

> §219. Offenses as to which there is no limitation. - There is no limitation of time within which a prosecution must be commenced for any public offense which may be punished capitally, or for murder in the second

> degree, manslaughter in the first degree, arson, forgery, counterfeiting, or any offense expressly punishable, under the provisions of this Code, as forgery or counterfeiting." (Title 15, Code of Alabama, 1940) (Emphasis supplied)

Since the Petitioner's crime was capital in 1958, there was no limitation on it. See Title 14, Section 123, Code of Alabama, 1940, quoted at page 3 above. These statutes remained in this same form until the 1975 Code of Alabama went into effect on October 30, 1977.

Now, the Petitioner argues that this Honorable Court's decision in Furman v. Georgia, (408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 [1972]) abolished the capital penalty and erected a three year statute of limitations on his crime. There are several problems with this argument.

First, Furman did not abolish the capital penalty at all but merely disapproved the procedures by which it was administered. See Dobbert v. Florida, 432 U.S. 282, 53 L. Ed. 2d 344, 97 S. Ct. 2290 (1977) In the second place the interpretation and application of state statutes of limitation are matters of state law.

Recognizing the lack of federal question here, the Petitioner seeks to federalize this argument, which was rejected by the State Courts, by claiming that persons who committed the same crime as the Petitioner after Furman would have the benefit of a three year statute of limitations. It could be argued that at the time of his crime the Petitioner's crime could, in the words of the statute, "...be punished capitally...," while after Furman such offenses could not be so punished and that the resulting

discrimination is the sort which always occurs when a statute or rule is changed, as they must be from time to time. However, such an argument need not be made here, because the Petitioner's basic premise just isn't so.

Prior to Furman the Alabama courts did indeed define a "capital crime" and a "capital case" as one in which the death penalty was a possibility. Thus, where a trial for a capital felony resulted in a sentence other than death, the Automatic Appeals Statute did not apply. E.g. Salter v. State, 264 Ala. 473, 88 So. 2d 788, 789 (1956) However, after Furman it became apparent that, while most of the statutes which referred to the capital penalty reflected the legislature's desire for the careful and merciful administration of the ultimate penalty, such was not always the case. In several instances the legislature had simply used

the designation "capital" as a convenient classification of very serious crimes or cases. Obviously, for example, the exclusion of an offense from the statute of limitations was not based on concern for the penalty but on concern for the seriousness of the offense. The issue came before the Alabama Supreme Court in Ex parte: Bynam, (294 Ala. 78, 312 So. 2d 52, 71 A.L.R. 3rd 44 [1975]). Bynum was charged with the same offense as the instant Petitioner. Like the Petitioner, Bynum was indicted after Furman, but unlike the Petitioner, Bynum's crime had also occurred after Furman. Bynum was denied bail on the grounds that his crime was "capital." On habeas corpus Bynum argued that in light of Furman his crime was no longer capital, since the death penalty was not a possible sentence. The Alabama Supreme Court rejected this argument writing:

"...It is the opinion of this Court that the classification theory followed by the majority of states considering this issue is sound and should be adopted. In reaching this decision, we are aware of prior Alabama cases which interpreted the term "capital offense" to mean offenses for which the death penalty may be imposed Lee v. State, 31 Ala. App. 91, 13 So. 2d 585 (1943); Ex parte McCrary, 22 Ala. 65, (1853)[7]

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[7]Beginning at page 19 of the petition the petitioner argues as follows:

"...Also obvious is the proposition that after this Court's ruling in Furman v. Georgia, 408 U.S. 238 (1972), capital felonies as such ceased to exist in Alabama. Such a result necessarily obtains because the Alabama appellate courts had heretofore ruled that no offense can be truly capital unless the death penalty can be imposed. Ex parte, McCrary, 22 Ala. 65, 72; Lee v. State, 13 So.2nd 583 (Ala. App. 1943)..." (Petition pages 19-20)

> But these opinions were not written inthe context of Furman (which deals solely with the matter of constitutionally permissible punishment), and their application to the classification of capital offenses for the purposes of bail is not here decisive. The only effect of Furman was to eliminate the imposition of the death penalty as it was then enforced, and not to eliminate the classification whereby crimes are categorized as capital for purposes other than punishment...." (312 So. 2d 52, 55)

Thus, the Petitioner's argument on this point falls both on the law and the facts.

CONCLUSION

In conclusion the State of Alabama, Respondent, respectfully submits that the decisions and opinions of the Alabama Courts are patently correct and entirely consistent with the decisions of this Honorable Court and that the writ is due to be denied and the Respondent prays such denial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Respondent, do hereby certify that on this ____ day of November, 1982, I did serve the requisite number of copies of the foregoing on the Attorneys for Jesse Benjamin Stoner, Petitioner, by mailing same to them, first class postage prepaid and addressed as follows:

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Office - Supreme Court, U.S.
FILED
DEC 15 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-796

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JESSE BENJAMIN STONER,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND COURT OF
CRIMINAL APPEALS OF ALABAMA

REPLY BRIEF OF PETITIONER

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ARGUMENT

I

PRE-INDICTMENT DELAY

Petitioner is the victim of by far the longest known delay between alleged commission of a crime and indictment for that crime -- a delay of nineteen years and eighty-eight days -- during which period the State of Alabama was able to show no relevant activity on its part. The delay grossly and cruelly violated the Petitioner's right to due process of law, thus, preventing his mounting an effective defense at his trial.

The Respondent dwells on the speedy trial issue, but Petitioner has never raised a speedy trial defense. The only relevance of the right to speedy trial to this case is that the philosophical basis for the speedy trial guarantee is obviously offended by inexcusably long and prejudicial pre-indictment delays. The requirement of speedy justice, whether before or after indictment, has been part of the common-law tradition since the Magna Carta. **United States v. Lovasco**, 431 U.S. 783,800 (1977) (Stevens, J., dissenting).

According to sworn testimony of John A. Yung, IV, Assistant Attorney General of Alabama, who testified at Petitioner's trial, the investigation of Petitioner ended on July 14, 1958. Mr. Yung testified:

> "Q. Anyway the main thing is your having gone over the information comprising the file. Has anything developed of a prosecutorial nature or evidentiary nature since July 14, 1958?
>
> "A. Not that I am aware of.
>
> "Q. You have access to the entire file on Mr. Stoner that the State of Alabama has, I'm sure.

"A. I have access to everything the Attorney General's offices had. Whether or not there is anything else, I do not know." (Tr. 423).

Petitioner next called to the witness stand Burton Dunn, who was one of the two prosecutors, who was Assistant District Attorney in Jefferson County. Dunn testified:

"Q. As such you have gone through and are familiar with the files in this matter?

"A. Yes, sir.

"Q. You know from having reviewed that file that the evidence that the State of Alabama has offered during the course of this trial has been the same evidence they had on July 14, 1958?

"A. Yes, sir.

"Q. It has not changed in one regard, has it?

"A. No, sir." (Tr. 419)

Thus, the record shows that the State of Alabama's two prosecutors admitted that the investigation of petitioner was concluded on July 14, 1958. Their testimony was at the end of the trial in a motion hearing. The motion was overruled. (Tr. 428)

Respondent's brief, in effect, admits that the pre-indictment delay of 19¼ years prejudiced the defense when it says that the petitioner presented a ludicrous defense. Respondent misrepresents the trial. In violation of the First Amendment, Respondent State of Alabama conducted a political prosecution by going into petitioner's alleged political, religious and social beliefs. Respondent cross examined him about what he publicly published in a newsletter when he was a candidate for Governor of Georgia in 1970, asked him about his alleged lack of Church attendance and other public statements. (Tr. 396, 397, et seq.) Such matters

were raised by Respondent to cause bias against Petitioner. Petitioner has never advocated violence. (Tr. 341, 342).

While the Respondent embellishes its brief with frequent references to matters not in the record, a study of the actual evidence reveals absolutely no continuing investigation of the alleged crime during the almost twenty year hiatus before Petitioner's indictment.

Unable to show any justification for its delay, the Respondent resorts to a set of abstract criteria which it says might under suitable circumstances justify some prolongation of the period between a criminal event and the indictment or arrest of someone for it, but here the Respondent only proves Petitioner's case.

The criteria on pages 18 and 19 of Respondent's Brief are paraphrased and italicized:

1. *Would delay result in loss of evidence?* In Petitioner's case defense witnesses died, and documents were destroyed or lost in the normal course of events. Furthermore, **any** delay of over 19 years would result in loss of evidence, if only through the fading of memories.

2. *Would delay help identify co-conspirators?* No co-conspirators were identified in Petitioner's case; there is not even real evidence of a search for co-conspirators, much less of any specific reason why the indictment of Petitioner would have hindered their identification.

3. *What effect would prosecution have on existing undercover operations?* There is no proof that in fact there was any such purpose for the delay in Petitioner's prosecution. Considering the length of the delay -- not far short of a fifth of a century -- the idea is laughable. A large proportion of the participants in the events of the 1950s had died or retired before Petitioner's indictment.

4. *Are there alternatives to prosecution?* One sees no possible applicability of this question to the delay on Petitioner's case.

Pages 17 and 18 of Respondent's brief point out that a prosecutor can decide when to prosecute. But a prosecutor's discretion is limited, among other things, by the prospective accused's rights to due process of law. Where the right to a fair defense is prejudiced, there are strongly countervailing factors. Additionally, the state interest in stopping crime and deterring criminals is in no way served by waiting over 19 years to prosecute. Proper social and criminological purposes are not served by waiting to prosecute a man in his fifties for the alleged crime of a 34 year old.* Petitioner was born on April 13, 1924. (Tr. 308)

Respondent's disseration (pages 18-23) on social conditions in the 1950's and 1960's, replete with factual details unsubstantiated by anything in the record, is a bald-faced admission that the State of Alabama attempted to (and did) gain a tactical advantage over Petitioner by stalling for time. The State, if it were doing anything related to the alleged crime, was admittedly waiting for the social climate to change so that there would be greater community prejudice against a person accused of such wrongdoing.

Even had there been any acceptable excuse for the early part of the delay, it would certainly not have countenanced a delay of over 19 years.

In its effort to depict the loss of Petitioner's witnesses and documentary evidence (as a result of Respondent's delay) as of no consequence to Petitioner's defense, the Respondent resorts to misrepresentation of the evidence. It was not Petitioner's fault that his former employer's records (which would have been valuable exculpatory evidence of his location during the period of the alleged crime) were destroyed in the ordinary course of business.

*There is no evidence of any criminal act by Petitioner, or any charge against him, except for the one alleged in this case.

A letter to Petitioner from the Regional Manager of State Farm Insurance Companies of the Regional Office which supervised petitioner in 1958 stated:

"Because of the sheer volume of paper work created by the very nature of an insurance operation, we find ourselves in the position of purging the kind of reports you referenced in your letter, as soon as we can legally do so. Daily reports on settlement activity and all weekly expense reports dating back twenty two years ago have been purged from our files for some time.

"About all we would be able to do is confirm that you were an employee of State Farm in May and June of 1958, and that you did indeed operate out of an office in Dublin, Georgia. (Tr. 558)

Likewise, no matter how many ways the Respondent restates what it was Petitioner was charged with (Respondent's brief, pages 3 and 24), Petitioner's alibi evidence would have been indisputably relevant and could have had a decisive effect on a jury. Furthermore, Petitioner is not "badly crippled" as offensively and dishonestly stated on page 25 of Respondent's brief. The evidence at trial was that Petitioner walks "with a slight limp." (Tr. 319) Petitioner thus could benefit from his evidence that he could not have been anywhere near the scene of the crime. Respondent's admission that "no one has any idea who actually placed the bomb at the church" (Respondent's brief, page 11), not only admits that the Petitioner, without such knowledge, could scarcely have been involved in a conspiracy to place the bomb, but also that a jury could well have been swayed by evidence removing Petitioner from the category of those who might have placed the bomb.

In its further attempts to discount the effect of the deaths of defense witnesses over the years, Respondent

makes the astonishing statement on page 24 of its brief that if the witnesses had been alive they would not have been permitted to testify to Petitioner's "self-serving" declarations. It would be a novel rule of law which barred witnesses from giving testimony favorable to an accused's defense.

Respondent makes a lot of its observation that Petitioner's affidavit "does not suggest that the Petitioner in anywise protested or took issue with Morris' alleged statement" that the police informant Morris had himself set off the bomb. (Respondent's brief, pages 10-11) Why the Petitioner's apparent failure to take issue with Morris' admission that Morris set off the bomb should be labeled by the Respondent an "admission against interest" (page 24 of brief) is mystifying. Certainly the testimony of witnesses that a man other than the Petitioner had admitted committing the crime could have been of the greatest import to a jury. Of that exculpatory testimony, as well as a great deal of other saving evidence that would have been available over the years immediately following the explosion of the bomb, the Petitioner was deprived by the State's delay.

The cases cited by the Respondent in its brief support the Petitioner's claim. Delay prior to arrest or indictment may give rise to a due process claim under the Fifth Amendment. **United States v. MacDonald**, 102 S. Ct. 1497, 71, L. Ed. 2nd 696,703 (1982). Inordinate delay may impair a defendant's ability to present an effective defense: That particular interest is protected primarily by the Due Process Clause and statutes of limitation. **Id.** at 703-704. Due Process protects against purposeful or tactical delay that causes the accused actual prejudice at trial. **Id.** at 711.

United States v. Marion, 404 U.S. 307 (1971) involved a pre-indictment delay of only three years. There had not yet been a trial. The accused did not claim or demonstrate any specific prejudice, not was there any evidence of governmental delay to gain tactical advantage. This Court

said that events of the future trial might demonstrate actual prejudice, but that in the meantime the due process claims were premature and speculative. **Id.** at 326.

Marion did not reach the question of when and in what circumstances actual prejudice resulting from pre-accusation delays would require dismissal of the presecution, and suggested that "To accommodate the sound administation of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case." **Id.** at 325. Because of limitations of space in this brief, Petitioner can only refer the Court respectfully to Mr. Justice Brennan's concurring opinion in **Marion**. In the last paragraph of his concurring opinion, he wrote, "I think a three year delay even in that kind of case goes to the edge of permissible delay." **Id.** at 335. Such a delay of over 19 years would be much less permissible in a case such as Petitioner's.

United States v. Lovasco, 431 U.S. 783 (1977) concerned a mere 18 month delay in indictment, during which little information was uncovered and two witnesses died. The accused did not state how the witnesses would have aided his defense. There had not yet been a trial, the accused having moved to dismiss the indictment. The Court found that the year and a half delay was justified in that case by investigative necessity. (There is no evidence in Petitioner's case that Alabama knew any more about him in 1977 than it did in 1958.) The Court stated that investigative delay is fundamentally unlike delay undertaken to gain tactical advantage, and it specifically limited its holding in **Lovasco** to that particular case. (**Id.** at 795-796).

Respondent completely misrepresents and misconstrues **Leonard v. Hey**, 269 S.E. 2d 394 (S.Ct. W.Va, 1980), a case strongly favorable to Petitioner, when Respondent says that **Leonard** rejected this Court's holding in **Marion** and **Lovasco** and expressly refused to decide the case under

the Federal Constitution. **Leonard** involved pre-indictment delay of 11 years, and the Supreme Court of West Virginia held that for that reason there was prima facie prejudice to the accused, and infringement on his constitutional right to due process of law. and that unless the governement could justify the delay by proving its reasonableness, the accused was entitled to dismissal of the indictment.

Contrary to Respondent's assertions, **Leonard** relies on, rather than rejects, **Marion** and **Lovasco**, quoting approvingly from them. **Id**. at 396. It relies no less on them than on **Dickey v. Florida**, 398 U.S. 30 (1970), and it is untrue to say that West Virginia decided **Leonard** "under **Dickey v. Florida**." Furthermore, the **Leonard** court's statement that it need not interpret federal law to define due process was purely gratuitous and certainly implied no conflict between the West Virginia and the United States Constitutions.

Petitioner rejects (and a reading of **Leonard** will disprove) Respondent's claim that **Leonard** conflicts with the holdings of this Court -- while there is no doubt that the pertinent holdings of West Virginia and Alabama are in conflict, with Alabama the State which is in conflict with the relevant statements of this Court and with the Constitution of the United States.

II

STATUTE OF LIMITATIONS

On page 23 of Respondent's Brief and Argument In Opposition To The Writ, respondent admits "that the 1975 Code of Alabama would impose a statute of limitations forever barring the prosecution," which is an admission that the Alabama State legislature imposed a statute of limitations so as to comply with this Court's ruling in

Furman v. Georgia, 408 U.S. 238 (1972).

This Court has said "....Statutes of limitations which provide predictable legislatively enacted limits on prosecutorial delay, provide the primary guarantee against bringing overly stale criminal charges." **United States v. Lovasco**, 431 U.S. 783,789 (1977). In summarizing his discussion of this issue, petitioner contends that his case is analagous to the case of **United States v. Provenzano**, 423 F. Supp. 62 (S.D. of N.Y 1976). The court therein held that the limitations of prosecutions' provision expired with the capital nature of the crime.

Since no one was killed in this case, there was no way that the death penalty could have been imposed on petitioner after this Court rendered its decision in **Furman v. Georgia**, supra, in July of 1972. Therefore, he was entitled to Alabama's three year statute of limitations beginning at that time, if not in 1958.

Criminal statutes of limitation are to be interpreted liberally in favor of repose. **United States v. Habig**, 390 U.S. 222,227 (1968).

There is nothing in the record to support Respondent's claim (page 23 of Respondent's brief) that Petitioner's case was presented to the Grand Jury to stay within Alabama's statute of limitations.

CONCLUSION

The Petitioner was clearly deprived of his right to Due Process of Law by the Respondent's record-breaking delay of over 19 years between alleged crime and indictment. The Court has never dealt with precisely the same factual situation, but the statements of this Court in the most similiar cases strongly support the Petitioner's claim and point to the unconstitutionality of Petitioner's treatment by Respondent and of the holdings of the Alabama courts in

his case.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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December 15, 1982

CERTIFICATE OF SERVICE

This is to certify that upon the date stated above, I have served a true copy of the within and foregoing Reply Brief of Petitioner, postage prepaid, to opposing counsel by sending three copies to:

Honorable Charles E. Graddick
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